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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

SIERRA CLUB,

Petitioner,

vs.

CITY OF SAN ANTONIO, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 16 U.S.C. 1540(g), federal district courts "shall have jurisdiction" over citizen suits to enforce such provisions of the Endangered Species Act as the prohibition against the "take" of federally-listed endangered species.

1. May enforcement of federal statutory private rights of action, such as the citizen-suit provision of the Endangered Species Act, be prevented by judicial creation of a new form of mandatory abstention, applicable even when the federal right is unenforceable in the state forum?

2. Does appeal of a preliminary injunction expand appellate jurisdiction so that a district court refusal to abstain that is unappealable under *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), nonetheless becomes appealable?

LIST OF PARTIES

APPELLANTS

City of San Antonio and San Antonio Water System
Bexar Metropolitan Water District
Redland Stone Products Co.
Southwest Research Institute
United Services Automobile Association
City of Hondo
City of Leon Valley
City of Uvalde

APPELLEES

Sierra Club
New Braunfels Utilities

INTERVENOR

United States

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 112 F.3d 789 (5th Cir. 1997), and reproduced at App. 1-App. 30. The Fifth Circuit's denial of rehearing and suggestion for rehearing en banc is reported at 118 F.3d 1580 (Table), and reproduced at App. 31-App. 32. The opinion and orders of the United States District Judge for the Western District of Texas, Midland-Odessa Division, are not reported in the official reporters; the five of them relevant here are at App. 33-App. 62.

JURISDICTION

The opinion of the Fifth Circuit issued on April 30, 1997. App. 1. The Fifth Circuit denial of panel rehearing and of the suggestion for rehearing en banc issued on June 20, 1997. App. 31. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THE CASE

Federal

The Endangered Species Act of 1973, as amended, 16 U.S.C. 1531-1544 (1994), provides in relevant part:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency (to the

> extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof[.]
>
> . . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.
>
> 16 U.S.C. 1540(g).

State

The Edwards Aquifer Act, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, *as amended*, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505, provides in relevant part:

> The legislature finds that the Edwards Aquifer is a unique and complex hydrological system, with diverse economic and social interests dependent on the aquifer for water supply. In keeping with that finding, the Edwards Aquifer is declared to be a distinctive natural resource in this state, a unique aquifer, and not an underground stream. To sustain these diverse interests and that natural resource, a special regional management district is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state. Use of water in the district for beneficial purposes requires that all reasonable measures be taken to be conservative in water use.
>
> § 1.01

The legislature finds that the water in the unique underground system of water-bearing formations known as the Edwards-Balcones Fault Zone Aquifer has a hydrologic interrelationship to the Guadalupe, San Antonio, San Marcos, Comal, Frio, and Nueces river basins, is the primary source of water for the residents of the region, and is vital to the general economy and welfare of this state. The legislature finds that it is necessary, appropriate, and a benefit to the welfare of this state to provide for the management of the aquifer through the application of management mechanisms consistent with our legal system and appropriate to the aquifer system.

§ 1.06(a).

Authorizations to withdraw water from the aquifer and all authorizations and rights to make withdrawal under this Act shall be limited in accordance with this section to:

(1) protect the water quality of the aquifer;

(2) protect the water quality of the surface streams to which the aquifer provides springflow;

(3) achieve water conservation;

(4) maximize the beneficial use of water available for withdrawal from the aquifer;

(5) protect aquatic and wildlife habitat;

(6) protect species that are designated as threatened or endangered under applicable federal or state law; and

(7) provide for instream uses, bays, and estuaries.

To accomplish the purposes of this article, by June 1, 1994, the authority, through a program, shall implement and enforce water management practices, procedures, and methods to ensure that, not later than December 31, 2012, the continuous minimum springflows of the Comal Springs and the San Marcos Springs are maintained to protect endangered and threatened species to the extent required by federal law. . . .

§ 1.14(a) & (h).

The authority may assess an administrative penalty against a person who violates this article or a rule adopted or order issued under this article . . .

Judicial review of the order of the authority:

(1) is instituted by filing a petition as provided by Section 19, Administrative Procedure and Texas Register Act . . . ; and

(2) is under the substantial evidence rule. . . .

All proceedings under this section are subject to the Administrative Procedure and Texas Register Act . . .

§ 1.37(a), (n), & (r).

STATEMENT OF THE CASE

A federally-listed endangered species – the fountain darter (*Etheostoma fonticola*) – lives at the mouth of two of the largest natural springs in Texas and the entire southwestern United States.[1] Lying in Central Texas between Austin and San Antonio, Comal Springs in New Braunfels and San Marcos Springs in San Marcos are surface outcroppings of a 175-mile long underground water formation known as the Edwards Aquifer. The land overlying the Aquifer hosts a burgeoning population; San Antonio alone is one of the ten largest cities in the country.

San Antonio and the other defendant local political subdivisions, industries, and private commercial interests pump hundreds of millions of gallons of water daily from the Edwards Aquifer; they use it for such purposes as industrial production processes, drinking water, lawn and golf course watering, and agricultural production. San Antonio, which has not developed any surface water supplies, is the largest volume Aquifer pumper. App. 53.

As the area grows, pressures on the Aquifer mount; it is being depleted, or "mined." The trial court determined that the amount of water taken by withdrawals and springflows from the Aquifer for each of the three years prior to this lawsuit (1993-1995) exceeded total recharge.

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[1] The springs are the habitat for three other endangered species (San Marcos gambusia, Texas blind salamander, and Texas wild rice) and a threatened one (San Marcos salamander). These springs support tourism and scientific research critical to the area economy. App. 42.

App. 42.[2] "[E]ach year, the Aquifer continues to drop lower and lower and never regains the volume it held the previous year." App. 59.

The natural resource problems associated with overpumping of the Edwards Aquifer might have remained confined to the realms of state public policy but for the fact that the endangered fountain darter's habitat was the Comal and San Marcos Springs. The darter's continued existence as a species depends on flows from those springs remaining above a certain level. App. 52 ("endangered species are dying as the result of the low springflows"). These facts led the Sierra Club to file its citizen enforcement suit under Section 9 of the Endangered Species Act ("ESA") against San Antonio and other large Aquifer pumpers in the summer of 1996.[3] The Sierra Club raised no state law claims and sued no state regulatory bodies or officials for their actions. The suit's central objective was to reduce overpumping from the Aquifer so that the endangered fountain darter's habitat would be

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[2] The presiding trial judge had acquired considerable technical familiarity with operation of the Aquifer from having presided over an earlier Endangered Species Act suit against the Secretary of Interior to force development of a recovery plan for endangered and threatened species dependent on the Aquifer for habitat. App. 4 (citing *Sierra Club v. Babbitt*, No. MO-91-CA-069 (W.D. Tex.)). An appeal from the trial court's rulings in that case ended with a mootness determination by the Fifth Circuit in light of publication of a revised recovery plan by the U.S. Fish and Wildlife Service. App. 4 (citing *Sierra Club v. Babbitt*, No. 94-50260 (5th Cir. Oct. 18, 1995)).

[3] The Sierra Club asserted a claim under § 7 of the ESA against the U.S. Department of Defense, which operates military bases in the area, but that claim is not involved in this petition.

maintained, meaning that Comal and San Marcos Springs would not drop below levels the Fish and Wildlife Service had determined were necessary to sustain the species and protect individual members of the species from harm due to habitat destruction.[4] The central mechanism for achieving the objective was to tie permitted Aquifer pumping to springflow levels, proportionately increasing or decreasing pumping commensurate with springflow levels. As springflows dropped, pumping would be reduced and vice-versa.

The model for the Club's ESA claim was the Court's thematic "drained pond" illustration in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995), which upheld the Secretary of Interior's regulation making habitat modification part of the ESA's definition of an illegal "take." There, the Court explained the paradigm of an illegal ESA "take" as "when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat." 115 S.Ct. at 2414; *see also* 115 S.Ct. at 2414-15 n. 15 (same image); 115 S.Ct. at 2420 (O'Connor, J., concurring).

After an evidentiary hearing, the trial court determined to issue an injunction:

> The Court is soundly convinced that an emergency presently exists and takes of endangered species are occurring.

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[4] These levels are called, respectively, the "jeopardy" and "take" levels. At the time of trial on the preliminary injunction, both springs had been continuously below these federally-established levels for some time. App. 56.

App. 41. Less than a week later, the trial court reiterated its determination, in response to stay requests from some of the Aquifer pumpers:

> The significant habitat modification and degradation caused by over-pumping from the Edwards Aquifer has indeed harmed the Edwards dependent endangered species and amounts to a take.
>
> . . . .
>
> [S]pringflow remain below the jeopardy and take levels established by USF&W.

App. 52; App. 56 (footnote omitted).

Adopting the basic approach urged by the Sierra Club, the court tied its injunction to these findings that violations of the ESA's "take" prohibitions were occurring with regard to the fountain darter. Using winter pumping rates for the various pumpers as a baseline, the court imposed a series of tiered pumping rules keyed to springflows. App. 44. At high flows, pumping was unrestricted; at lower flows, it was restricted to a certain varying percentage *above* the winter rate. The lowest pumping rate was to be 1.2 times the winter average when Comal springflow dropped below 175 cubic feet per second. *Id.* The court delayed the effectiveness of its injunction so that none of these restrictions was to be triggered until October 1, 1996, more than a month after issuance of the injunction. App. 49.[5]

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[5] The Fifth Circuit stayed the injunction before it ever came into force. App. 6.

Both before and immediately after issuance of the injunction, the district court considered and rejected requests that it abstain from enforcement of the ESA. App. 33-36; App. 56-57. The Aquifer pumpers had urged that the district court step aside from the ESA suit in deference to a newly-created state regulatory body called the Edwards Aquifer Authority ("EAA"), even though that body had no jurisdiction over an ESA suit and even though there was no known way by which the Sierra Club could gain official party status before that state body.

The Texas legislature had created the EAA as a regional body in reaction to the earlier Sierra Club endangered species suit against the Secretary of Interior. *See* fn. 2, above. The EAA had only just begun operation, having overcome a state constitutional challenge from local water interests only two days before the district court's evidentiary hearing; it had no substantive rules in place and no pending adjudicative administrative proceedings.[6]

The district court emphasized the tentative nature of its refusal to abstain because of the existence of the fledgling EAA, expressing its "hope" that the EAA will

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[6] *See Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996). To this day, there has never been an adjudicative administrative proceeding of any sort before the EAA. It did not even put basic administrative and regulatory rules into effect until February of 1997, more than a half year after issuance of the injunction. *See* 22 Tex. Reg. 1393-1405 (Feb. 7, 1997) (permit application processing rules); 22 Tex. Reg. 1648-1671 (Feb. 11, 1997) (interim critical period management rules).

act on the resource problem and explaining that it might abstain were the EAA to take meaningful action. App. 41; App. 56. Still, the court honored formal legislative policy and determined that "[u]ntil that time, it is the duty of this Court to follow Congress's directive that the endangered species and their critical habitat be protected." App. 42. The court further delineated its duty to observe the Article III jurisdiction with which Congress had invested it and the point at which that duty would be discharged: "Abstaining at this juncture would require this Court to ignore Congress's federal statutory mandate as evidenced in the ESA. Until or unless the EAA is watching over the Edwards dependent endangered species, this Court will not abstain." App. 56-App. 57.

A divided panel of the Fifth Circuit held that abstention was *required* in this circumstance and vacated the district court injunction on that ground, without addressing the other issues raised on appeal. Relying on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the two-member majority read the Edwards Aquifer Act as establishing a "comprehensive regulatory scheme," App. 9, concerning water resources that are "a matter of great state concern," App. 10. The court observed a "need for unified management and decision-making regarding the aquifer[.]" App. 11. With a passing nod to its own precedents holding that *Burford* abstention is disfavored when only federal claims are raised, App. 13, the court nonetheless chose the opposite course, noting that *Burford* itself involved a constitutional "due process of law" claim: "If abstention is warranted when the plaintiff is claiming a violation of his constitutional rights, then surely it is also warranted

where the plaintiff claims a federal statutory violation." App. 14.

Relying on post-appeal filings, the court indicated that the EAA had moved from being in the "process" of taking comments and formulating rules to beginning operations. App. 14. In the court's view, *Burford* abstention applies even before a state regulatory scheme is "fully in place." App. 15.

The majority acknowledged the accuracy of the Sierra Club's argument that the state's Edwards Aquifer Act "does not provide any state court judicial review for a plaintiff such as itself." App. 16. The court's response was that a federal citizen-suit plaintiff could lose its federal statutory right altogether under *Burford* abstention and even be excluded entirely from a deferred-to state proceeding. After all, the court observed, either the EAA or the state's main environmental agency could proceed with some kinds of state court actions in connection with EAA activities. App. 16-App. 17. *Burford* abstention, said the court, applies even if the federal plaintiff does not have a "private, judicial cause of action under the state regulatory scheme[.]" App. 17. The Fifth Circuit did not address in this context the failure of the Edwards Aquifer Act to concentrate judicial review or related proceedings concerning the EAA in a centralized set of state courts; under the statute, such proceedings are not concentrated in any particular set of state courts.

The court looked to the ESA to see if it contained language prohibiting abstention and, finding none, concluded that the statute was thus no bar to abstention, even though the ESA stated jurisdiction in imperative

terms ("shall have jurisdiction"). App. 19. Finally, in light of the fact that the EAA was engaged in nothing more than formal rulemaking, the court held that *Burford* "does not require the existence of an ongoing state proceeding with which the federal court action directly interferes." App. 19.

There was a vigorous dissent by Judge Benavides, with a methodical treatment of the rationale for *Burford* abstention. App. 20-App. 30. He viewed *Burford* as inapplicable "[b]ecause the administrative scheme enacted by the State of Texas does not afford adequate judicial review of the Sierra Club's federal claim[.]" App. 20. After noting that this Court had required *Burford* abstention in only two cases since the doctrine's inception (one of those being *Burford* itself), App. 22, the dissent found the abstention argument "flatly inconsistent with a governmental system in which federal law is supreme." App. 29. It was, posited Judge Benavides:

> nothing more than a plea for this court to abrogate its duty to enforce a federal right granted to private citizens by Congress because doing so would potentially conflict with important local interests.

App. 28-App. 29. For these reasons, Judge Benavides found the *Burford* doctrine inapplicable and dissented from its invocation.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has upended federalism, setting in motion an unacceptable principle of "reverse" preemption[7] that, left undisturbed, prohibits federal court enforcement in the Fifth Circuit of *all* Congressionally-created private rights of action that touch on areas subject to state regulation, whether implemented or not. The principle, though dressed in the federalism garb of abstention, is a rejection of the Supremacy Clause that applies to a host of important federal statutory rights. Further, and at least as disturbing because of separation of power concerns, the principle usurps Congressional power by using a judge-made doctrine to override a statutory right Congress conferred on citizens.

Even limited to the Endangered Species Act, the Fifth Circuit ruling has important national implications. Only this year, this Court has characterized the citizen-suit provision at issue in this case as "an authorization of remarkable breadth" reflecting a congressional decision "to permit [ESA] enforcement by everyman[.]" *Bennett v. Spear*, 117 S.Ct. 1154, 1162-63 (1997) (unanimously holding that those seeking to prevent application of environmental restrictions have standing under § 1540(g)). The Fifth Circuit's decision truncates the reach of the very ESA citizen-suit provision this Court has said "covers *all* private violations of the Act," 117 S.Ct. at 1163 (emphasis added). The statute is an important and powerful component of the Congressional environmental arsenal, and the

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[7] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990) (holding that state law cannot displace federal law).

citizen-suit provision in turn is an important and powerful component of the ESA. Whether the Fifth Circuit's unique abstention doctrine can effectively blunt *Spear's* ESA standing rule raises a question important to the administration of federal justice, of which citizen-suits are an important part, by Congressional design.

Compounding the disturbing ramifications of the Fifth Circuit rationale, the Fifth Circuit has curtailed federal district court jurisdiction through an expansion of federal appellate jurisdiction. Under *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), district court abstention denials are not appealable interlocutorily; yet, by treating the abstention issue as an aspect of the "likelihood of success" element of the preliminary injunction four-part inquiry, the Fifth Circuit has performed an end-run around *Mayacamas* that is at odds with this Court's careful separation of the abstention inquiry from the "likelihood of success" inquiry in the preliminary injunction appeal in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975), and the Court's restrictive treatment of pendent appellate jurisdiction in *Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995).

I.

THE FIFTH CIRCUIT'S REQUIREMENT OF ABSTENTION CONFLICTS WITH CONTROLLING AUTHORITY FROM THIS COURT, AND ITS APPLICATION OF THE ABSTENTION FACTORS IS IN CONFLICT WITH THEIR APPLICATION IN OTHER CIRCUITS.

The Fifth Circuit's abstention ruling is inconsistent with guiding precedent from this Court. First, the very premise of the abstention doctrine is that the relief being

sought must be discretionary. *Quackenbush v. Allstate Insurance Co.*, 116 S.Ct. 1712, 1728 (1996) (abstention authority "only where the relief being sought is equitable or otherwise discretionary"); *see also Quackenbush*, 116 S.Ct. at 1728 (Scalia, J., concurring) (no affront to federalism whenever Congress "instructs federal courts to assert jurisdiction over matters as to which relief is not discretionary"). In the seminal ESA case of *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court bowed to the powerful congressional statement of the ESA's purpose (describing the "incalculable" value of saving endangered species) and determined that the usual judicial authority to engage in equitable balancing had been congressionally overridden in the ESA:

> Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

437 U.S. at 194.

Thus, the discretion that is prerequisite to application of the abstention doctrine, and without which federal courts lack authority to avoid enforcement of congressional directives, is absent in this ESA private right of action case. The Fifth Circuit's abstention ruling is in conflict with this Court's ruling in *TVA v. Hill*. *See also New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989) ("*NOPSI*") ("Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds").

Even if *TVA v. Hill's* reading of the ESA is set aside, however, and some discretion is found to reside in the federal courts related to enforcing the ESA "take" prohibition where it is being violated, the Fifth Circuit's abstention ruling remains in conflict with governing authority from this Court. In *NOPSI*, the Court re-emphasized that abstention is the exception not the rule. 491 U.S. at 359.[8] Emphasizing that no state-law claim was involved, the Court explained in *NOPSI* that the mere existence of a complex state administrative process does not require abstention, nor does the potential for conflict with state regulatory law or policy. 491 U.S. at 362. Further, the Court highlighted the fact that the federal proceeding did not involve the details of administration of the state regulatory scheme, only a four-corner review of the administrative ruling. 491 U.S. at 362-63.

Here, as in *NOPSI*, the state administrative process is not directly implicated; it exists but that is all as far as the federal issue is concerned. Similarly, as in *NOPSI*, any potential for conflict with the Texas regulatory scheme is at best theoretical. And unlike in *NOPSI*, no ruling or order of the EAA need be construed at all to decide the ESA question. There had been – and has been – no administrative adjudication by the EAA of anything, and its post-injunction rules were neither interpreted nor enjoined by the district court's injunction. Consideration of the consequence of some hypothetical future conflict between potential ESA judicial remedies and EAA regulation is premature.

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[8] As here, *NOPSI* came from the Fifth Circuit, whose ruling in favor of *Burford* abstention this Court reversed.

Furthermore, even as it determined *Burford* abstention improper, *NOPSI* assumed adequate and timely state court review was available to the federal claimant. 491 U.S. at 361. That *sine qua non* of *Burford* abstention is wholly absent in this case.

The Fifth Circuit ruling, as ably demonstrated by the dissent, is without precedent, bereft of any supporting authority from this Court, and in conflict, at a minimum, with *TVA v. Hill* and *NOPSI*. But it is more than a legal derelict. The legal rationale underpinning it threatens enforcement in the Fifth Circuit territory of numerous other private rights of action, both in environmental arenas beyond ESA confines (such as clean air and clean water) and in other fields where Congress has created a statutory private right of action that touches on state-regulated activity. For example, the Court has recognized private rights of action under such important Congressional anti-discrimination statutes as Title IX of the Education Amendments of 1972, *see Cannon v. University of Chicago*, 441 U.S. 677 (1979), and §§ 2 and 5 of the Voting Rights Act of 1965, as amended, *see Chisom v. Roemer*, 501 U.S. 380 (1991) (§ 2), *and Allen v. State Board of Elections*, 393 U.S. 544 (1969) (§ 5). The Fifth Circuit's abstention principle threatens private citizen enforcement of these critical civil rights provisions. This threat lives even now in the important region encompassed by the Fifth Circuit.

Its effect in this case is devastating. Though the ruling came in the context of an appeal of a preliminary injunction, it effectively terminates the litigation. The abstention bar purports to leave open the possibility of enforcement "if the State of Texas fails to" protect the species. App. 17. Inasmuch as the Fifth Circuit found an

abuse of discretion by the district court in failing to provide more opportunities for EAA action, and inasmuch as the district court, uncontradicted by the Fifth Circuit, found an emergency existed, requiring immediate action to avoid "takes" of endangered species, it is hard to conceive of a situation where waiting for the state to act will have been a long enough wait. Thus, the lower court's abstention ruling effectively forecloses the possibility of enforcement of the Endangered Species Act by the Sierra Club. Its practical effect is the same as a dismissal.

Beyond the Fifth Circuit in other statutory private action contexts, and beyond the important contours of this case, the Fifth Circuit ruling conflicts with application of the *Burford* abstention doctrine by other circuits. The Fifth Circuit rejected the argument that *Burford* abstention is inapplicable if only federal claims are raised. The Ninth Circuit, on the other hand, embraces that position. *United States v. Adair*, 723 F.2d 1394, 1402 n. 5 (9th Cir. 1983), *cert. denied sub nom. Oregon v. United States*, 467 U.S. 1252 (1984). The Fifth Circuit rejected the position that, since nothing of the EAA was being "reviewed," *Burford* did not apply. The First Circuit, on the other hand, has held that a state proceeding must be under federal court review in order for *Burford* to apply. *Fragoso v. Lopez*, 991 F.2d 878, 883 (1st Cir. 1993). Resolving these conflicts can help bring coherence to the frustratingly amorphous *Burford* abstention doctrine.

The Fifth Circuit's unprecedented contraction of the broad citizen suit provision of the ESA functions as a pro tanto contraction of the standing rule of *Bennett v. Spear* and undermines the balance it established in the law's

enforcement. Under the ruling under review, those who resist application of federal environmental policies now will be in a superior position. With standing as recognized in *Bennett v. Spear*, those parties can virtually always point to some state policy, and some state regulatory body, that would be directly or indirectly affected by enforcement of the anti-take provisions of the ESA. If the Fifth Circuit rule remains, they then can oust the trial court of enforcement authority, regardless of the facts salient to the endangered species. The plaintiffs pressing for anti-take ESA enforcement will have been left with an empty Congressional promise, emptied not by Congress but by the courts through their own self-made rule. *Burford* abstention will have accomplished the judicial repeal of the ESA private right of action.

Important issues are at stake here beyond the Edwards Aquifer and the fountain darter: of a corrected federalism; of a reinstituted Supremacy Clause; and of federal judicial recognition that it must enforce Congressional enactments that substantially reduce or eliminate discretion. Leaving the Fifth Circuit's misapplication of the abstention doctrine unaddressed threatens unwarranted harm to unsuspecting claimants under many varieties of federal citizen suit provisions. Employing a judicially-created doctrine whose doctrinal premise rests in major part on the discretionary play in trial court joints to deny that very discretion to the trial court is a fundamental misapplication of the doctrine. Appellate hamstringing of district courts in the service of discretion contradicts the Court's abstention principles.

II.

AN APPEAL FROM THE GRANT OF A PRELIMINARY INJUNCTION DOES NOT GIVE THE APPELLATE COURT JURISDICTION OVER THE DISTRICT COURT'S DENIAL OF A MOTION TO ABSTAIN.

In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), the Court held that denials of abstention are not appealable interlocutorily either as final decisions under 28 U.S.C. 1291 or as injunction rulings under 28 U.S.C. 1292(a)(1). The "inherently tentative" nature of abstention denials formed the underpinning of the Court's conclusion:

> In denying such a motion [for abstention], the district court may well have determined only that it should await further developments before concluding that the balance of factors . . . warrants a dismissal or stay.

485 U.S. at 278.

The Fifth Circuit nonetheless rationalized interlocutory review of the abstention denial by treating abstention as an element of a claimant's likelihood of success on the merits. This ruling flies in the face of the Court's *Mayacamas* rationale in a case in which the district court repeatedly stressed that its abstention rulings were only tentative. It evades the *Mayacamas* rule by conflating the abstention decision with the preliminary injunction decision. App. 7-App. 8.

Until recently, there was a line of authority from this Court that, though it did not address the precise question here, might have been usefully employed by those seeking to avoid *Mayacamas's* clear holding. Cases such as

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940), occasionally authorized appending otherwise unappealable interlocutory trial court decisions to preliminary injunction appeals. As explained earlier, *Doran v. Salem Inn*, 422 U.S. 922, indicates the inapplicability of this line of authority in the context of abstention denials through its separation of that issue from the preliminary injunction issue.[9]

But there is a more recent restriction on this *Deckert*-style doctrine of pendent appellate jurisdiction. *Swint v. Chambers County*, 115 S.Ct. 1203, substantially narrowed pendent appellate jurisdiction – though it did not eliminate it entirely, *see Clinton v. Jones*, 117 S.Ct. 1636, 1651 n. 41 (1997). A central reason for this narrowing was the Congressional expansion in 28 U.S.C. 1292(e) of this Court's rulemaking authority over the appeal of otherwise unappealable interlocutory decisions. As explained in *Swint*, expansion of appellate jurisdiction in this context should come through the rulemaking route rather than the case adjudication route, on the premise that the statutory directive "warrants the Judiciary's full respect." 115 S.Ct. at 1211.

The Fifth Circuit expansion of its appellate jurisdiction is at odds not only with *Mayacamas*, but also with *Swint* and § 1292(e). Research has not revealed a decision by this Court that countenances the jurisdictional expansion accomplished by the Fifth Circuit. Especially since this appellate jurisdictional expansion was in the service of an unprecedented restriction of district court jurisdiction, the

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[9] *Doran* dealt with *Younger* abstention.

issue warrants full and careful review by this Court in the exercise of its supervisory powers over the lower courts.

Swint has left those courts with a great deal of uncertainty about their appellate jurisdiction. *See, e.g., IDS Life Insurance Co. v. Sunamerica, Inc.*, 103 F.3d 524, 528 (7th Cir. 1996) (Posner, J.) (indicating that *Swint* had "thrown into doubt" the whole concept of pendent appellate jurisdiction); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995) (stating that concept of pendent issue appellate jurisdiction is "uncertain" in light of *Swint*). Resolution of the appellate jurisdictional issue in this case would help clarify the present uncertain state of court of appeals jurisdiction.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50636

(Filed Apr. 30, 1997)

SIERRA CLUB,

Plaintiff-Appellee,

versus

CITY OF SAN ANTONIO, ET AL.,

Defendants,

NEW BRAUNFELS UTILITIES,

Defendant-Appellee,

versus

CITY OF SAN ANTONIO, SAN ANTONIO WATER SYSTEMS, CITY OF HONDO, TEXAS, On Its Behalf and All Other Municipal Industrial, Commercial, Domestic and Livestock Pumpers in Medina, CITY OF UVALDE, TEXAS, On Its behalf and All Other Municipal, Industrial, Commercial, Domestic and Livestock Pumpers in Uvalde and Kinney Counties, CITY OF LEON VALLEY, TEXAS, On Its Behalf and All Other Municipal, Domestic and Livestock Pumpers in Bexar and Atascosa Counties, REDLAND STONE PRODUCTS COMPANY, On Its Behalf and All Other Industrial and Commercial Pumpers, SOUTHWEST RESEARCH INSTITUTE, On Its Behalf and All Other Industrial and Commercial Pumpers in Bexar and Atascosa Counties,

UNITED SERVICES AUTOMOBILE ASSOCIATION, On Its Behalf and All Other Industrial and Commercial Pumpers in Bexar and Atascosa Counties, and BEXAR METROPOLITAN WATER DISTRICT,

Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

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Before REAVLEY, GARWOOD and BENAVIDES, Circuit Judges.

REAVLEY, Circuit Judge:

This appeal is taken from a preliminary injunction entered by the district court to regulate the withdrawal of water from the Edwards Aquifer, a large underground reservoir supplying water to central Texas. Because we hold that the Sierra Club did not establish a substantial likelihood of success on the merits, in light of the abstention doctrine enunciated in *Burford v. Sun Oil Co.*,[1] we vacate the injunction.

BACKGROUND

The City of San Antonio relies exclusively on the Edwards Aquifer for its water. Other parts of central Texas also rely on the aquifer as a primary source of water. It supplies over one million people with water in San Antonio alone.

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[1] 319 U.S. 315 (1943).

The aquifer discharges water into the Guadalupe River Basin at the San Marcos and Comal Springs. According to the Sierra Club the annual recharge of the aquifer for several years has been exceeded by the annual discharge (withdrawals plus springflow), causing the aquifer level to fall each year. It claims that a continuation of the status quo inevitably will either lead to the complete drying up of the springs or render them intermittent.

In the area of the San Marcos and Comal Springs, the aquifer is home to five plant and animal species designated as endangered or threatened under the Endangered Species Act.[2] Of the five, one – the fountain darter – is found at Comal Springs. The fountain darter is an endangered species.

In 1996 the aquifer suffered a severe drought. The spring flow at Comal Springs fell from April through June and then leveled off. In June of 1996, the Sierra Club's expert zoologist observed five or six "very thin" fountain darters in the uppermost spring run of Comal Springs. The Sierra Club claims that it presented direct evidence of fountain darter deaths, injuries in the form of emaciation, and a scarcity of young fountain darters due to the low spring flows, and that there is a causal link between the low spring flows and defendants' pumping of water from the aquifer. San Antonio's hydrology expert stated that he did not anticipate further declines in the water levels after August 1, 1996, and that the water level would rise in the fall.

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[2] 16 U.S.C. §§ 1531-44.

In a prior suit, *Sierra Club v. Babbitt*,[3] filed in 1991 in the same district court, the Sierra Club sued the Secretary of the Interior and the United States Fish and Wildlife Service under the Endangered Species Act. The suit claimed that the Fish and Wildlife Service had failed to adopt an "adequate recovery plan" under that Act. This suit lasted five years, and included several appeals to the Fifth Circuit. In one appeal our court recognized abstention concerns, and particularly *Burford* abstention, as sometimes calling for federal court abstention "to allow the state's comprehensive regulatory scheme to operate without the risk of competing attempts between that regulator and the federal courts to exercise control over the same entity."[4] On remand, the district court declined to abstain, because at the time the Edwards Aquifer Act[5] (described below) had been declared unconstitutional. The court reasoned that there was no competing state regulatory system in place that would make abstention appropriate under *Burford*. In 1996 this court ordered the *Babbitt* suit dismissed as moot after the Fish and Wildlife Service published a revised recovery plan.

The Sierra Club brought the pending suit in June of 1996 under the Endangered Species Act. The complaint, seeking certification of a defendant class, alleges that defendants are "taking" endangered species in violation

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[3] No. Mo-91-CA-069 (W.D.Tex.).

[4] *Sierra Club v. Babbitt*, No. 94-50260 (5th Cir. Oct. 18, 1995), at 6.

[5] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2355, *as amended by* Act of May 29, 1995, 74th Leg., R.S., ch 261, 1995 Tex. Sess. Law Serv. 2505.

of the Endangered Species Act.[6] The complaint seeks to enjoin defendants "to reduce withdrawals from the Edwards by such levels as are necessary to maintain minimum natural springflows from the Comal and San Marcos Springs for the conservation and survival of the endangered and threatened species living at and downstream from those springs." The named defendants include San Antonio and numerous other governmental and private entities.

In 1993 the Texas Legislature enacted the Edwards Aquifer Act, creating a regulatory scheme to control and manage the use of the aquifer. An administrative body, the Edwards Aquifer Authority, was created to oversee this regulatory scheme. A state district court ruled the Act unconstitutional, but in 1996 the Texas Supreme Court unanimously upheld the facial constitutionality of the Act. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex.1996). The federal district court, in the *Babbitt* case, recognized that if the Texas Supreme Court were to uphold the constitutionality of the Edwards Aquifer Act, "this Court would do everything in its power to allow the [Authority] to function and nothing that would frustrate the [Authority]."

Shortly after the present suit was filed the Texas Supreme Court ruled in the *Barshop* case. San Antonio and other defendants moved to dismiss the suit on *Burford* abstention grounds. The Sierra Club moved for a preliminary injunction. After a one-day evidentiary hearing, the court denied the motion to dismiss and entered

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[6] *See* 16 U.S.C. § 1538(a)(1)(B).

the preliminary injunction now on appeal.[7] The court concluded that "an emergency presently exists and takes of endangered species are occurring," and that "[w]ithout a fundamental change in the value the region places on fresh water, a major effort to conserve and reuse Aquifer water, and implemented plans to import supplemental supplies of water, the region's quality of life and economic future is imperiled." The court incorporated by reference a "1996 Emergency Withdrawal Reduction Plan," which provides for comprehensive regulation of pumping from the aquifer.

In its order granting the injunction the court did not immediately impose the Emergency Withdrawal Reduction Plan, but did order limitations on pumping based on spring flows, the effect of which was that the municipal defendants were limited to water use of 1.2 times their winter usage. The court found that the Edwards Aquifer Authority "has a great learning curve to overcome before it is ready to manage the Aquifer." It ordered that the injunction remain in effect until the defendants can demonstrate that a critical management plan by the Edwards Aquifer Authority that will preserve endangered species is operative. It also ordered the parties to supply the court and a special master with monthly water usage information and all other information "necessary to keep the Court informed as to compliance with this Order."

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[7] This court has stayed the injunction pending appellate review.

DISCUSSION

The party seeking a preliminary injunction must establish: (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) that the threatened injury outweighs any damage that the injunction will cause the opposing party, and (4) that the injunction will not disserve the public interest.[8] The decision to grant or deny a preliminary injunction is reviewed for abuse of discretion.[9] Likewise, we generally review abstention decisions under an abuse of discretion standard.[10]

The Sierra Club contends that the district court's decision not to abstain under *Burford* is not properly before us on appeal, but we find no merit to this argument.[11] The issue before us is not the ultimate question of

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[8] *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir.1991).

[9] *Id.*

[10] *American Bank and Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 922 n. 6 (5th Cir.1993).

[11] The Sierra Club argues that an order denying abstention is not appealable under *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), and that the defendants are attempting an "end run" around this rule by treating their abstention argument as an appeal of an order granting an injunction. There is no merit to this argument. Whether the court should have abstained goes directly to whether the plaintiff was likely to succeed on the merits. The defendants are entitled to raise this argument in this interlocutory appeal of the injunction, which is plainly allowed under 28 U.S.C. § 1292(a)(1). *Gulfstream* did not involve an injunction. It was an attempt to appeal the denial of a motion to stay or dismiss on abstention grounds. The Sierra Club also cites *Doran v. Salem*

whether the district court should abstain, but whether the court properly entered a preliminary injunction. The latter question turns on whether the Sierra Club established a substantial likelihood of success on the merits in the face of the *Burford* abstention doctrine.

The Sierra Club failed to meet the first requirement of a preliminary injunction – a substantial likelihood of success on the merits – because abstention appears so manifestly warranted under *Burford*. In *Burford*, plaintiff Sun Oil brought a federal suit challenging a Texas Railroad Commission order granting a drilling permit to defendant Burford. Sun Oil claimed the permit violated its due process rights. The Court held that the federal district court should have abstained, noting the comprehensive nature of the state regulatory scheme, the large interest of the state in regulating and conserving its oil and gas resources, and the need for a unified approach to granting permits by a single adjudicatory body.

Factually, *Burford* and our case are very similar. In *Burford*, the Court emphasized the elaborate and comprehensive nature of the state regulatory scheme in issue. It

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Inn, Inc., 422 U.S. 922, 930 (1975), which states that "the issuance of a preliminary injunction is not subject to the restrictions of *Younger*." This case is inapposite because it was not discussing whether the refusal of a court to abstain is immediately appealable. The quoted passage was part of a discussion of whether *Younger v. Harris*, 401 U.S. 37 (1971), applies to a plaintiff who has not yet been subjected to state criminal proceedings, to which the Court's answer was no. The case did not discuss *Burford* abstention, nor did it discuss appealability of an abstention ruling.

described the Railroad Commission order under consideration as "part of the general regulatory system devised for the conservation of oil and gas in Texas," noted that the Commission "carries out its functions of production control or proration by an elaborate system of orders, schedules, and reports," and that the state regulatory scheme provided a "well organized system of regulation and review."[12]

Similarly, the Edwards Aquifer Act can fairly be characterized as a comprehensive regulatory scheme. It represents a sweeping effort by the Texas Legislature to regulate the aquifer, with due regard for all competing demands for the aquifer's water. The Act vests the Edwards Aquifer Authority with "all the powers and privileges necessary to manage, conserve, preserve, and protect the aquifer. . . . " The Authority controls withdrawals from the aquifer through a permit system. Section 1.25 of the Act charges the Edwards Aquifer Authority with developing "a comprehensive water management plan that includes conservation, future supply, and demand management plans." The Act also specifically addresses the preservation of endangered species. Under § 1.14 of the Act the Authority must "protect aquatic and wildlife habitat" and "protect species that are designated as threatened or endangered under applicable federal or state law." The Authority is empowered to file civil suits in state district court for an injunction. In addition, a separate entity, the Texas Natural Resource Conservation Commission, is authorized under § 1.39 of

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[12] 319 U.S. at 318, 320 n. 12, 327.

the Act to file suit for an order of mandamus against the Authority to compel the Authority to perform its duties.

Burford emphasized that the state regulatory scheme in issue concerned the "very large" interest of the state in conserving oil and gas, and that the Railroad Commission's regulation of oil and gas production was "of vital interest to the general public . . . with implications to the whole economy of the state."[13] The regulation of water resources is likewise a matter of great state concern. As the Texas Supreme Court stated in *Barshop*, "[c]onservation of water has always been a paramount concern in Texas, especially in times, like today, of devastating drought."[14] It characterized the Edwards Aquifer as "the primary source of water for residents of the south central part of this state. It is vital to the general economy and welfare of the State of Texas."[15] The court recognized that "the State has the responsibility under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans."[16] The Texas Legislature, speaking through § 1.01 of the Edwards Aquifer Act, found that the aquifer "is a unique and complex hydrological system, with diverse economic and social interests dependent on the aquifer for water supply."

The defendants correctly note that both the aquifer and the endangered species are entirely intrastate, which

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[13] *Id.* at 320, 324-25.

[14] 925 S.W.2d at 626.

[15] *Id.* at 623.

[16] *Id.*

makes management of the aquifer a matter of peculiar importance to the state.[17]

The record in this case also illustrates the vital importance of the aquifer to the citizens of central Texas. For example, the president of the San Antonio Water System testified that the injunction's limitation of water use to 1.2 times average winter use would likely require the city to maintain lower water pressure than state law requires for fighting fires. A consulting engineer for the City of Leon Valley testified that the restrictions would necessitate the complete curtailment of outside watering, resulting in damage to 50% of the foundations in the city with damages to each home ranging from $2000 to $20,000. Other defendants offered similar evidence through affidavits.

As in *Burford*, there is a need for unified management and decision-making regarding the aquifer, since allowing one party to take water necessarily affects other parties. The Court in *Burford* noted that for many reasons "each oil and gas field must be regulated as a unit," that well spacing and proration "are a part of a single integrated system and must be considered together," and that "[t]he state provides a unified method for the formation of policy and determination of cases by the Commission

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[17] The defendants separately argue that applying the Endangered Species Act to these circumstances is beyond the power of Congress to regulate interstate commerce and therefore unconstitutional. The United States has urged that we not reach this issue unless, all other appellate challenges to the temporary injunction being first rejected, it becomes necessary to do so in order to resolve this appeal. We do not reach any constitutional issue.

and by the state courts."[18] The Court stressed the need for unitary enforcement of the regulatory scheme by noting the problem of drainage: "Since the oil moves through the entire field, one operator can not only draw oil from under his own surface area, but can also, if he is advantageously located, drain oil from the most distant parts of the reservoir. The practice of attempting to drain oil from under the surface holdings of others leads to offset wells and other wasteful practices; and this problem is increased by the fact that the surface rights are split up into many small tracts."[19] The Court noted that "the physical facts are such that an additional permit may affect pressure on a well miles away. The standards applied by the Commission in a given case necessarily affect the entire state conservation system."[20]

Similar concerns surely affect regulation of an aquifer. As our court stated in the *Babbitt* appeal:

> [t]he Edwards aquifer contains a finite amount of water, and as such, the need for uniform regulation is paramount. The Supreme Court has recognized that such circumstances sometimes require the federal courts to abstain to allow the state's comprehensive regulatory scheme to operate without the risk of competing attempts between that regulator and the federal courts to exercise control over the same entity.[21]

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[18] 319 U.S. at 319, 323 n. 15, 333-34.

[19] *Id.* at 319.

[20] *Id.* at 324.

[21] Opinion at 6 (citing *Burford*).

The opinion goes on to state that "[a]s with the oil fields at issue in [*Burford*], in the present case, Texas clearly has an interest in uniform decision-making regarding this finite amount of water."[22]

The Sierra Club argues that abstention is not warranted because it only seeks relief under a federal law, the Endangered Species Act. The district court noted in the *Babbitt* case that "*Burford* abstention normally arises in a case in which a federal court has diversity jurisdiction over exclusively state law issues." Our court has stated that one factor is deciding whether *Burford* abstention should apply is whether the cause of action arises under federal or state law.[23]

However, *Burford* itself states that abstention is appropriate whether jurisdiction is premised on diversity jurisdiction or otherwise, if the federal courts should, consistent with our federal system, afford comity to state governments in carrying out their domestic policy. The Court held: "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, *whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise,* 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their

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[22] *Id.* at 6 n. 4.

[23] *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir.1993).

domestic policy.' "[24] *Burford* abstention does not so much turn on whether the plaintiff's cause of action is alleged under federal or state law, as it does on whether the plaintiff's claim may be "in any way entangled in a skein of state law that must be untangled before the federal case can proceed."[25] Moreover, our case is not distinguishable from *Burford* because the cause of action is based on federal law. In *Burford* as well, the cause of action alleged was that the order of the Railroad Commission had denied plaintiffs "due process of law."[26] If abstention is warranted when the plaintiff is claiming a violation of his constitutional rights, then surely it is also warranted where the plaintiff claims a federal statutory violation.

The district court reasoned that abstention was unwarranted because the Edwards Aquifer Authority had not had time to develop a plan for managing the aquifer and dealing with the emergency situation. The record indicates that the Authority is in the process of taking comments and formulating rules for permits and emergency measures. The State informs us in an amicus brief that the Edwards Aquifer Authority "is now established and has begun operations." In a supplemental filing San Antonio points out that on December 19, 1996, the

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[24] 319 U.S. at 317-18 (quoting *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933) and *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935)).

[25] *Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1726 (1996) (quoting *McNeese v. Board of Ed. for Community Unit Sch. Dist.*, 373 U.S. 668, 674 (1963)).

[26] 319 U.S. at 317.

Authority issued final rules for filing and processing of permit applications, and for critical period management.

We do not believe that *Burford* abstention is applicable only where the state regulatory scheme is fully in place. The Supreme Court has noted that "[w]e have since provided more generalized descriptions of the *Burford* doctrine, *see, e.g. . . . Colorado River* (abstention where 'exercise of federal review of the question in a case and in similar cases would be disruptive of state *efforts to establish* a coherent policy with respect to a matter of substantial public concern')".[27]

The only significant factual distinction between our case and *Burford* – that the Railroad Commission's regulatory scheme in *Burford* was well established – is not a sound basis for concluding that abstention is not warranted here. The reasoning of *Burford* did not turn on the fact that the regulatory scheme was old, but that it was a comprehensive scheme governing a matter of vital state interest, and one where uniform application of rules was important. These same concerns apply to our case.

In its brief the Sierra Club defends the injunction by arguing that it was entered only after the court "was informed that the [Edwards Aquifer Authority], on the night before the preliminary injunction hearing, had voted against declaring an emergency. . . . " In denying the motion to dismiss on abstention grounds, the district court noted that "the Edwards Aquifer Authority voted at

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[27] *Quackenbush*, 116 S.Ct. at 1725 (emphasis added; quoting *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 814-16 (1976)).

its July 31, 1996 hearing that an emergency did not exist and thus no emergency measures needed to be taken. . . . This Court, based on the documentary and testimonial evidence heard to date, believes than an emergency does exist." What the court's action indicates is that it is willing to abstain as long as the state authority agrees with it. The purpose of *Burford* abstention is to discourage such federal court second-guessing of state regulatory matters. *Burford* abstention is particularly appropriate where "[b]y proceeding the district court would have risked reaching a different answer than the [state] institutions with greater interest in and familiarity with such matters."[28]

The Sierra Club argues that the Edwards Aquifer Act does not provide any state court judicial review for a plaintiff such as itself. The Sierra Club may be correct, since, unlike the Endangered Species Act,[29] there is no express private citizen cause of action created in the Edwards Aquifer Act for entities such as environmental groups to seek judicial redress for statutory violations. The defendants argue that there is provision for state court review in the state Act, since § 1.11(h) of the Edwards Aquifer Act provides that the Authority is subject to the Texas Administrative Procedure Act.[30] It is unclear, however, whether this provision gives a private cause of action or confers standing on an environmental group like the Sierra Club. But as explained above, the

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[28] *Wilson*, 8 F.3d 311 at 315.

[29] *See* 16 U.S.C. § 1540(g).

[30] The Texas Administrative Procedure Act is now codified at TEX. GOV'T CODE ANN. § 2001.001 *et seq.* (Vernon Supp.1997).

Edwards Aquifer Authority is charged with protecting endangered species and is authorized to file civil suits in state district court for injunctive relief, and a separate entity, the Texas Natural Resource Conservation Commission, is authorized to file suit for an order of mandamus against the Authority to compel it to perform its duties.

The Supreme Court has described *Burford* abstention as applicable "[w]here timely and adequate state-court review is available."[31] However, we find no authority that *Burford* abstention cannot apply unless the plaintiff himself has a private, judicial cause of action under the state regulatory scheme, and the Supreme Court has recently stated that there is no "formulaic test for determining when dismissal under *Burford* is appropriate."[32]

Judge Benavides' "dissent" – a dissent, not from the judgment, but from deciding the appeal – treats the Sierra Club as the possessor of a claim of right rather than one of standing. The true interest here is that of the public in the preservation of the fountain darter. The rationale of *Burford* abstention is served by the state's regulation of this enormous water resource rather than by the federal court. At least, that appears to be true from this preliminary injunction record. We state no bar against the Sierra Club, either in pursuing the merits or in ultimate efforts to protect the water and darters if the State of Texas fails to do so.

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[31] *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989).

[32] *Quackenbush*, 116 S.Ct. at 1726.

The Sierra Club argues that abstention cannot be used to create "negative preemption," meaning that a state cannot set up its own regulatory scheme and then claim that a federal regulatory scheme should be ignored. It cites *Adams Fruit Co. v. Barrett.*[33] In that case the plaintiffs, migrant farm workers, were injured and received state worker compensation benefits. They then sued under the federal Migrant and Seasonal Agricultural Worker Protection Act.[34] The Court held that the state law providing that a worker who receives worker's compensation cannot recover any other benefits did not bar the plaintiffs from pursuing their federal remedy. It stated that "we refuse to adopt [defendant's] 'reverse' pre-emption principle that would authorize States to withdraw federal remedies by establishing state remedies as exclusive."[35] This case is not on point since it does not discuss abstention. The Sierra Club may be confusing preemption with abstention.

Regardless, we agree with the Sierra Club that, as a general proposition, a State should not be able to create a regulatory scheme and then claim that federal regulation of the same subject matter does not apply. In effect it argues the state Act has "preempted" federal review of its federal claim if the federal court abstains. The response to this argument, however, is that the same thing happens *whenever* a federal court abstains and the plaintiff has asserted a federal claim. This is almost always the case

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[33] 494 U.S. 638 (1990).

[34] 29 U.S.C. § 1801 *et seq.*

[35] 494 U.S. at 648.

with *Younger* abstention,[36] where the plaintiff brings suit in federal court, seeking to enjoin a state proceeding on grounds that his federal constitutional rights are being violated.

Another weakness in the Sierra Club's "negative preemption" argument is that the Endangered Species Act cannot fairly be described as an attempt to preempt all state law related to conservation and the protection of endangered species. The Act itself states: "It is further declared to be the policy of Congress that Federal Agencies shall cooperate with State and Local Agencies to resolve water issues in concert with conservation of endangered species."[37] The language of the federal Act does not suggest that abstention is to be avoided in cases brought under it.

The Sierra Club also argues that abstention should not apply because there is no state administrative proceeding underway with which the federal proceeding is in conflict. We find this argument factually and legally unavailing. Factually, the record indicates that the Edwards Aquifer Authority has proceeded with rulemaking for the granting of permits and critical period management, and has already declined to declare an emergency. The federal court's injunction conflicts with these actions. Legally, *Burford* abstention does not require the existence of an ongoing state proceeding with which the federal court action directly interferes. This requirement is found with *Younger* abstention, which applies

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[36] *See Younger v. Harris*, 401 U.S. 37 (1971).

[37] 16 U.S.C. § 1531(c)(2).

"when federal court jurisdiction would interfere with pending criminal, civil, or administrative state proceedings," and requires that "the pending state proceeding must be ongoing and judicial in nature."[38]

For these reasons, we conclude that the district court erred in granting the preliminary injunction. The order granting the injunction is VACATED.

BENAVIDES, Circuit Judge, dissenting:

The *Burford* abstention doctrine applies only "[w]here timely and adequate state-court review is available." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (*NOPSI*). Because the administrative scheme enacted by the State of Texas does not afford adequate judicial review of the Sierra Club's federal claim, *Burford* is inapplicable. Therefore, I cannot agree with the majority's conclusion that "[t]he Sierra Club failed to meet the first requirement of a preliminary injunction – a substantial likelihood of success on the merits – because abstention appears so manifestly warranted under *Burford*."

I.

When Congress enacted the Endangered Species Act, it explicitly provided that "any person may commence a civil suit on his own behalf to enjoin any person . . . who is alleged to be in violation of this chapter or regulation issued under the authority thereof. . . . " 16 U.S.C.

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[38] *Baran v. Port of Beaumont Navigation Dist.*, 57 F.3d 436, 441 (5th Cir.1995).

§ 1540(g)(1)(A). The appellants acknowledge that the district court had federal subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1331 and the Endangered Species Act, 16 U.S.C. § 1540(c).[1] The Supreme Court has long recognized that federal courts have a "virtually unflagging" obligation to exercise the jurisdiction conferred upon them by Congress. *See, e.g., NOPSI,* 491 U.S. at 359. Although this duty is not absolute, abstention is "the exception, not the rule." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1984). Specifically, the Supreme Court has recently emphasized that *Burford* abstention applies only in a "narrow range of circumstances." *Quackenbush v. Allstate Insurance Co.,* ___ U.S. ___, 116 S.Ct. 1712, 1725, 135 L.Ed.2d 1 (1996).

II.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . , any Thing in the Constitution or the laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. The Supremacy Clause makes federal law binding on the "Judges in every State." *Id.* Pursuant to this constitutional provision, state courts are obligated to exercise judicial review of federal claims properly within their jurisdiction.

Abstention involves a federal court's refusal to exercise jurisdiction it clearly possesses in favor of a state

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[1] The Endangered Species Act provides that "[t]he several district courts of the United States . . . shall have jurisdiction over any actions arising under this chapter." 16 U.S.C. § 1540(c).

court's exercise of jurisdiction. Thus, when a federal court abstains in a case in which a federal question is presented, state courts are obligated to exercise judicial review of that claim. If, for some reason, the state court does not have jurisdiction to review the federal claim, abstention is inappropriate. For example, this court has recognized that *Burford* abstention is inapplicable when a federal court has exclusive jurisdiction over the plaintiff's federal claim. *See Evans v. Dale*, 896 F.2d 975, 978-79 (5th Cir.1990).

The Supreme Court has required *Burford* abstention in only two cases. The first, *Burford v. Sun Oil Co.*, 319 U.S. 315, 316-17, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), involved a challenge to the validity of an order of the Texas Railroad Commission. The plaintiffs asserted state law claims and argued that the Commission's order violated their right to due process of law under the Constitution.[2] *Id.* at 317, 63 S.Ct. at 1098-99. The Court ultimately

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[2] The *Burford* Court repeatedly emphasized that state law issues were predominant and that the federal constitutional claim bordered on the frivolous. *See, e.g., id.* at 325 ("While the constitutional power of the Commission to enforce [the challenged rule] or to make exceptions to it is seldom seriously challenged, the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of State law posed in those proceedings" (citations omitted)); *id.* at 328 ("The federal court has been called upon constantly to determine whether the Railroad Commission has acted within the scope of statutory authority, while the important constitutional issues have, as the federal court has repeatedly said, been fairly well settled from the beginning"). It is undisputed, of course, that the Sierra Club

concluded that the federal court should stay its hand because federal court litigation "threatened the purpose of the complex administrative system that Texas had established." *Quackenbush*, 116 S.Ct. at 1725 (citing *Burford*, 319 U.S. at 332).

Prior to reaching this conclusion, however, the Court noted that "judicial review of the Commission's decisions in the state courts [was] expeditious and adequate." *Burford*, 319 U.S. at 334. Essential to this conclusion, moreover, was the fact that the state courts were available to hear the plaintiffs' federal due process claim. In this regard, the Court specifically noted that "if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here." *Id.*

Similarly, in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 343, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), the plaintiff challenged an order of the Alabama Public Service Commission under state law and argued that the order "amounted to a confiscation of its property in violation of the Due Process Clause of the

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has asserted no state law claims against the appellants. This fact alone distinguishes the instant case from *Burford* and suggests that abstention is not appropriate. *Cf. NOPSI*, 491 U.S. at 361 (reversing this court's application of *Burford* abstention and noting that the case did not involve a state-law claim); *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir.1993) (holding that "whether the cause of action arises under federal or state law" is a relevant factor in assessing the applicability of *Burford* abstention).

Fourteenth Amendment."[3] The Court held that because "adequate review of an administrative order based upon predominantly local factors [was] available to appellee, intervention of a federal court [was] not necessary for the protection of federal rights." *Id.* at 349. In emphasizing the adequacy of state-court review of the plaintiff's federal constitutional claim, the Court noted that the plaintiff "ha[d] not shown that the Alabama procedure for review of Commission orders [was] in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders." *Id.*

The majority does not explain its justification for finding that "adequate state-court review is available." *NOPSI*, 491 U.S. at 361. One can only presume that it reaches this conclusion because "the Edwards Aquifer Authority is charged with protecting endangered species and is authorized to file civil suits in state district court for injunctive relief, and a separate entity, the Texas Natural Resource Conservation Commission, is authorized to file suit for an order of mandamus against the Authority to compel it to perform its duties." Nonetheless, the majority concedes that "[i]t is unclear . . . whether [the Edwards Aquifer Act] gives a private cause of action or

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[3] The Court noted that its concern was "limited to the propriety of a federal court injunction enjoining enforcement of a state regulatory order." *Id.* at 346. The instant case is distinguishable from both *Burford* and *Alabama Public Service Commission* because it does not involve an action for injunctive relief against a state regulatory commission. For this reason, moreover, the Court's concern about federal court interference with state regulatory orders is not implicated by the Sierra Club's lawsuit against the appellants.

confers standing on an environmental group like the Sierra Club."

Similarly, the appellants argue that state remedies "afford timely and adequate review of the Authority's protection of endangered species." This contention is debatable because the Act only *authorizes*, but does not *require*, the Authority and the Texas Natural Resource Conservation Commission to protect endangered species. In any event, the appellants' argument misses the point.

While it was important that the state administrative schemes in *Burford* and *Alabama Public Service Commission* provided adequate judicial review of the orders of the state commissions, that was only because the plaintiffs were challenging orders of the commissions, who were defendants in those cases. Adequate review of the commissions' orders in those cases was a necessary, albeit insufficient, justification for applying *Burford* abstention. Indeed, the Court relied on the fact that there was "adequate state-court review" of the plaintiffs' federal claims.

Thus, even assuming that Texas's administrative scheme provides adequate judicial review of the activity of the Authority, this does not justify this court's exercise of *Burford* abstention. First, the adequacy of judicial review of the Authority's action is irrelevant in this case because the Sierra Club is not challenging an order of the Authority. *See* note 3 and accompanying text. Second, adequate review of the Authority's decisions does not change the fact that there is no judicial review of the Sierra Club's federal claim.

Adequate state-court review of a plaintiff's federal claim is a necessary prerequisite to *Burford* abstention for

two reasons. First, as noted, the Supremacy Clause requires state courts to enforce federal laws. It would defeat the purposes underlying that protection for federal courts to abstain in cases raising federal claims where the state courts do not provide adequate judicial review of those claims. Second, adequate state-court review of a plaintiff's federal claims is necessary to ensure that the Supreme Court is able to maintain jurisdiction over those claims should the state courts fail to provide sufficient protection for federal rights.

III.

Neither the majority nor the appellants seriously dispute the Sierra Club's contention that it cannot bring an Endangered Species Act claim within the auspices of the Edwards Aquifer Act.[4] Instead, the appellants claim that the "Sierra Club is free to bring its ESA claims in the State courts of Texas. . . . " Assuming this is true, however, the appellants' argument ignores the rationale justifying *Burford* abstention in the first place.

The Supreme Court has explained that "*Burford* is concerned with protecting complex state administrative processes from undue federal interference." *NOPSI*, 491 U.S. at 362. Therefore, in an appropriate case, a federal court must defer to the state court's administrative scheme. In the absence of adequate review of a plaintiff's

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[4] The majority concedes that "[t]he Sierra Club may be correct, since, unlike the Endangered Species Act, there is no express private citizen cause of action created in the Edwards Aquifer Act for entities such as environmental groups to seek judicial redress for statutory violations." (citation omitted).

federal claim within that scheme, however, deference to state courts does not further the policies justifying *Burford* abstention.[5]

To find authority for the proposition that "adequate state-court review" must occur within the state administrative scheme, one need look no further than *Burford* itself. There, the Court explained the need for abstaining in favor of a uniform and comprehensive scheme of state-court review:

> To prevent the confusion of multiple review of the same general issues, the legislature provided for concentration of all direct review of the Commission's orders in the State district courts of Travis County. The Texas courts have authoritatively declared the purpose of this restriction: If an order of the commission, lawful on its face, can be collaterally attacked in the various courts and counties of the state on grounds such as those urged in the instant case, interminable confusion would result. . . . Concentration of judicial supervision of Railroad Commission orders permits the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field. . . . The very 'confusion' which the Texas legislature and the

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[5] *See McNeese v. Board of Educ. Community Unit Sch. Dist. 187*, 373 U.S. 668, 674-75, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963) (declining to apply *Burford* abstention in a school desegregation case brought pursuant to section 1983 because it was not clear that state law provided the plaintiffs "with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights").

> [State] Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction.

319 U.S. at 327 (internal quotations and citations omitted). *See also Alabama Pub. Serv. Comm'n*, 341 U.S. at 348 ("Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are supervisory in character."); *NOPSI*, 491 U.S. at 374 (Rehnquist, C.J., concurring) (agreeing with the Court that abstention was inappropriate, but noting that he "would not foreclose the possibility of *Burford* abstention in a case . . . [where] the State consolidated review of the orders of local ratemaking bodies in a specialized state court with power to hear a federal preemption claim").

The Sierra Club's Endangered Species Act claim cannot be raised within the scheme that Texas has established to regulate Edwards Aquifer water. In this important sense, then, the state's administrative scheme is not uniform and comprehensive in the same manner the Supreme Court has considered dispositive. In fact, "the very confusion" the *Burford* doctrine seeks to avoid would result "from review by many state courts" of claims brought under the Endangered Species Act. *Burford*, 319 U.S. at 327.

IV.

The appellants' abstention argument amounts to nothing more than a plea for this court to abrogate its duty to enforce a federal right granted to private citizens

by Congress because doing so would potentially conflict with important local interests.[6] The Supreme Court has recognized, however, that *Burford* "does not require abstention whenever there exists [a state administrative process], or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *NOPSI*, 491 U.S. at 362 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 815-16). More important, the appellants' contention is flatly inconsistent with a governmental system in which federal law is supreme.

Because the Edwards Aquifer Act does not provide adequate judicial review of the Sierra Club's federal claim, I would find the *Burford* abstention doctrine inapplicable and would reach the arguments raised by the

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[6] Indeed, Congress recognized that enforcement of the Endangered Species Act might conflict with important local interests. *See* 16 U.S.C. § 1535. Therefore, Congress declared that "[i]n carrying out the program authorized by [the ESA], the Secretary [of the Interior] shall cooperate to the maximum extent practicable with the States." *Id.* § 1535(a). In this regard, Congress authorized the Secretary "to enter into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species." *Id.* § 1535(c).

Thus, the Endangered Species Act establishes an avenue whereby states can minimize federal interference. Nonetheless, the appellants do not claim to have followed the procedures outlined in the Act for entering into a cooperative agreement with the federal government. *See id.* § 1535(c)(1). Nor do the appellants claim to have established an "adequate and active program for the conservation of endangered species" under the Act. *See id.* These circumstances render the majority's deference to the state's administrative scheme particularly unwarranted.

appellants with respect to the extraordinary and extensive order appealed from herein. For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50636

(Filed Jun. 20, 1997)

SIERRA CLUB

Plaintiff – Appellee

v.

CITY OF SAN ANTONIO, ET AL,

Defendants

NEW BRAUNFELS UTILITIES,

Defendant – Appellee

v.

CITY OF SAN ANTONIO; SAN ANTONIO WATER SYSTEMS CITY OF HONDO, TEXAS, On Its Behalf and All Other Municipal, Industrial, Commercial, Domestic and Livestock Pumpers in Medina; CITY OF UVALDE, TEXAS, On Its Behalf and All Other Municipal, Industrial, Commercial, Domestic and Livestock Pumpers in Uvalde and Kinney Counties; CITY OF LEON VALLEY, TEXAS, On Its Behalf and All Other Municipal, Domestic and Livestock Pumpers in Bexar and Atascosa Counties; REDLAND STONE PRODUCTS COMPANY, On Its Behalf and All Other Industrial and Commercial Pumpers; SOUTHWEST RESEARCH INSTITUTE, On Its behalf and All Other Industrial and Commercial Pumpers in Bexar and Atascosa Counties; UNITED SERVICES AUTOMOBILE ASSOCIATION, On Its Behalf and All Other Industrial and Commercial Pumpers in Bexar and

Atascosa Counties; BEXAR METROPOLITAN WATER DISTRICT,

Defendants – Appellants

Appeal from the United States District Court for the Western District of Texas, Midland

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 4/30/97, 5 Cir. ___, ___ F.3d)

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB v. SAN ANTONIO, ET AL.	MO-96-CA-97 (Filed Aug. 14, 1996)

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is San Antonio, San Antonio Water System ("SAWS"), and Southwest Research Institute's ("SwRI") Motion to Dismiss Plaintiff's Complaint on *Burford* Abstention Grounds. Also before the Court is SAWS' Motion to Dismiss based on Commerce Clause grounds. The Court has ruled on SwRI's Motion to Dismiss on Commerce Clause grounds and filed an opinion with that Order. The Court hereby adopts the reasoning applied in denying SwRI's Motion to Dismiss and accordingly denies SAWS' Motion to Dismiss on Commerce Clause grounds.

Burford Abstention

Abstention doctrines are judge-made legal doctrines pursuant to which a federal district court with jurisdiction exercises its equitable discretion and declines to exercise that jurisdiction, in deference to ongoing state proceedings. Abstention doctrines cover "exceptional circumstances" justifying limits on the rule that a federal

court has a "virtually unflagging obligation" to exercise its jurisdiction, once properly invoked. *Quackenbush v. Allstate Insurance Co.*, 116 S.Ct. 1712, 1725-726 (1996); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-818 (1976). As discussed below, the *Burford* abstention doctrine does not apply here.

Burford abstention is appropriate when the following test is met:

> where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy questions of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989).

Burford abstention normally arises in diversity cases involving state law issues. 17A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 4244 at 86-88, § 4245 at 103. First, this is not a diversity case involving state law issues. Second, the mere fact that the state of Texas has created the Edwards Aquifer Authority and there is a potential for conflict with respect to the protection of the endangered species at Comal and San Marcos Springs does not mandate abstention. *See Baran v. Port of Beaumont Nav. Dist. of Jefferson County, Texas*, 57 F.3d 436 (5th Cir.

1995). This is a Section 9 (Takings) citizen action brought pursuant to the Endangered Species Act. *See* 16 U.S.C. § 1538. The case does not involve a state administrative proceeding. This is an action in which the conduct of the named Defendants is allegedly causing immediate injury to endangered species. *Burford* principles are not implicated when the federal cause of action does not involve a state administrative proceeding. *St. Paul Ins. Co. v. Trejo,* 39 F.3d 585, 589 (5th Cir. 1994).

Assuming arguendo, that the state courts have concurrent jurisdiction to hear ESA cases,[1] state courts do not have the authority to force the United States or its agencies to take any action. *See e.g., Knox Nat'l Farm Loan Ass'n v. Phillips,* 300 U.S. 194 (1937); *Morgan v. Woodruff,* 208 S.W.2d 628 (Tex.Civ.App. – Galveston 1948, no writ). The Department of Defense, Army and Air Force are Defendants in this lawsuit. A state district court has no authority to order these departments to comply with its orders. Thus, adequate state court review is unavailable in this case and *Burford* abstention is inappropriate. *See New Orleans Public Service, Inc. v. Council of New Orleans,* 491 U.S. at 361.

Finally, the Edwards Aquifer Authority voted at its July 31, 1996 hearing that an emergency did not exist and thus no emergency measures needed to be taken. Because the Edwards Aquifer Authority has the authority to mandate emergency measures when an emergency exits *or* when federal law is being violated, this Court concludes

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[1] The Court, nor any of the parties, have been able to cite any reported Texas where the state court heard a cause of action filed under the ESA.

that the Edwards Aquifer Authority is of the opinion that the ESA is not being violated. And even if Edwards Aquifer Authority action could be conceived as a state administrative proceeding, such proceeding terminated with the vote that no emergency exists. This Court, based on the documentary and testimonial evidence heard to date, believes that an emergency does exist; that takes of endangered species are occurring; and that some measures must be taken to ensure that the endangered species at Comal and San Marcos Springs are protected. It is this Court's unflagging duty under the law to insure that the endangered species are protected. Until or unless another agency takes *adequate* measures to protect the endangered species and their habitat, this Court will not abstain. Accordingly,

IT IS ORDERED that San Antonio, SAWS, and SwRI's Motions to Dismiss on *Burford* Abstention Grounds are hereby **DENIED.**

SIGNED this 12th day of August, 1996.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB	MO-96-CA-97
v.	
SAN ANTONIO, ET AL.	

ORDER

(Filed Aug. 16, 1996)

Came on to be considered before the Court in a hearing held in Austin, Texas on August 1, 1996, Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. Upon due consideration of the evidence presented, pleadings filed, and argument made, the Court, at this time, grants Plaintiff's Motion in part as follows:

Conditions within the San Antonio portion of the Edwards Aquifer constitute an emergency requiring prompt action to limit pumping to protect endangered species and the Edwards Aquifer. Such pumping limits must be crafted carefully to avoid endangering public health and safety and to minimize disruption of economic activity.

The development of appropriate limits requires consideration of very complex issues (for example, measures available to limit use by commercial and industrial

pumpers without unduly disturbing their essential business activities) and large amounts of data regarding various water users. In order to develop limits that incorporate appropriate consideration of those issues, the Court finds it necessary to appoint an expert – Special Master – pursuant to Federal Rule of Evidence 706. Mr. Todd Votteler is appointed as the Master and he shall have court approved assistance in those duties. Through Mr. Votteler's previous services as assistant to the Monitor in *Sierra Club v. Babbitt*, he has acquired unique expertise on these issues. Mr. Votteler shall be compensated at the rate of $100 per hour and shall recover reasonable expenses incurred in the pursuit of his duties, including costs for administrative and technical assistance. Those costs shall be assessed in a later Order.

Mr. Votteler is directed to provide to the Court, not later than 5:00 p.m. on August 11, 1996, recommendations on pumping limits consistent with this Order. Upon review, and modifications if appropriate, by the Court, those recommendations shall be circulated to the parties for review and comment in accordance with the Court subsequent instructions.

Any party that seeks to show cause why Mr. Votteler should not continue to serve as the Court-appointed Master in this matter shall submit its objections to the Court in writing no later than August 22, 1996, and shall submit, concurrently therewith, alternate nominations. Accordingly,

IT IS SO ORDERED.

SIGNED this 16th day of August, 1996.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB	**MO-96-CA-97**
v.	
SAN ANTONIO, ET AL.	(Filed Aug. 23, 1996)

ORDER

BEFORE THE COURT in the above captioned cause of action is Plaintiff Sierra Club's Motion for Preliminary Injunction. After considering the arguments of the parties, the evidence supplied by the parties, the testimony received at the two hearings on temporary and preliminary injunctions, and reviewing all of the parties' comments on the *Proposed 1996 Emergency Withdrawal Reduction Plan*, the Court believes that Plaintiff's Motion should be granted.

An Emergency Exists

The Edwards Aquifer region has finally reached the point where the Aquifer is unable to provide for the needs of all those who depend upon it during dry years, from persons directly over the Aquifer, to those persons and endangered species at Comal and San Marcos Springs. Without a fundamental change in the value the region places on fresh water, a major effort to conserve and reuse Aquifer water, and implemented plans to

import supplemental supplies of water, the region's quality of life and economic future is imperiled. The Court is soundly convinced that an emergency presently exists and takes of endangered species are occurring.

It is not the intention of this Court to frustrate or impede the present attempts by the Edwards Aquifer Authority ("EAA") to develop, implement and enforce a critical management plan that will protect the endangered species and their habitat. The Court is mindful that the EAA has had only a limited amount of time in which to digest and prepare a plan to protect the Edwards dependant species since it was given the nod by the Texas Supreme Court. But, this Court cannot ignore a federal statute designed to protect the endangered species at San Marcos and Comal Springs merely because the EAA has a great learning curve to overcome before it is ready to manage the Aquifer.[1] It is the Court's genuine hope that the EAA will be able to develop, implement and enforce a critical management plan which will meet the goals of the Endangered Species Act as well as protect the other users

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[1] Tex. S.B. 1477 § 1.01, 73rd Leg. (1995 as amended) ("a special regional management district is required for the effective control of the resource to protect terrestrial and aquatic life."); Tex. S.B. 1477 § 1.14, 73rd Leg. (1995 as amended) ("rights to make a withdrawal under this Act shall be limited in accordance with this section to . . . protect species that are designated as threatened or endangered under applicable federal or state law") ("shall implement and enforce water management practices, procedures, and methods to ensure that, not later than December 31, 2012, the continuous minimum springflows of the Comal Springs and the San Marcos Springs are maintained to protect endangered and threatened species to the extent required by federal law.").

of the Edwards. Until that time, it is the duty of this Court to follow Congress' directive that the endangered species and their critical habitat be protected.

THEREFORE the Court finds that:

1. According to data available from the U.S. Geological Survey, total discharge (withdrawals plus springflows) from the Edwards Aquifer has exceeded total recharge in 1993, 1994, 1995, and unless substantial rainfall occurs over the recharge zone this fall, is likely to include 1996;

2. Springflow at Comal Springs in New Braunfels, Texas has been below the jeopardy level for endangered species established by the U.S. Fish and Wildlife Service since May 23, 1996;

3. Springflow at San Marcos Springs in San Marcos, Texas has been below the jeopardy level for endangered species established by the U.S. Fish and Wildlife Service since May 22, 1996;

4. Tourism and scientific research at Comal and San Marcos Springs are critical to the economies of New Braunfels and San Marcos and substantially contribute to interstate commerce;

5. If the drought continues the potential exists for movement of the "bad-water line" which could allow the intrusion of bad-quality water into the fresh water zone, contaminating the fresh water in the Edwards Aquifer, the sole water supply for San Antonio and most water users in the region;

6. Some local governments and underground water districts have either ignored the current emergency or vacillated in their attempts to adopt and enforce essential reductions in Edwards Aquifer water use;

7. The Edwards Aquifer Authority has failed to recognize the current emergency in votes on July 31, 1996, and August 17, 1996, and has also failed thus far to activate an effective critical period (drought) management plan containing significant measures to conserve Edwards Aquifer water as required by Senate Bill 1477; and

8. Present springflow levels at Comal and San Marcos Springs are below the established jeopardy levels; and the U.S. Fish and Wildlife Service which is responsible for enforcing the Endangered Species Act has failed to initiate any legal action to protect endangered species at the Springs other than removal of specimens to refuges.[2]

The Court hereby incorporates by reference, the *1996 Emergency Withdrawal Reduction Plan* ("Plan"). This is the Plan that the Court would adopt if it were to adopt a comprehensive reduction plan. The parties may consider the reduction measures contained therein as they devise measures to meet the prescribed limitations. Rather than impose this plan on the parties, the Court will limit the monthly Edwards Aquifer pumpage by permitting the parties to determine how they will reach that reduction level. The Court is convinced that the suggestions made in the Plan would be useful to the parties in reaching their target pumping goals. However, as long as the maximum allowable peak-to-base pumping ratio is met, the Court is not concerned as to the manner in which such ration is accomplished.

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[2] It would appear from the failure to act by federal, state, and local agencies, that the question posed in *Genesis* 4:9 has been "No" when it should be "Yes."

Because of the emergency that presently exists with respect to the endangered species and their habitat, the Court now adopts the following municipal reductions developed in June 1995, by representatives of the Edwards Underground Water District, the City of San Antonio, the Green Valley Special Utility District and Atascosa Rural Water Supply Corporation, the City of New Braunfels and New Braunfels Utilities, and Danny McFadin, et al. These staged reductions and pumping requirements are found in the compromise emergency withdrawal reduction plan otherwise known as the *Lawyers Panel Plan*. The Court finds that these reduction levels are adequate during the current emergency.

Water Level Well J-17	Spring-flow	Reduction Stage	Peak Reduction Percentage Target	Maximum Allowable Peak-to-base Pumping Ratio
>655 ft msl	>260 cfs	none	none	full
655 and less	260 cfs	I	10%	1.8 x base
648 and less	200 cfs	II	20%	1.6 x base
642 and less	175 cfs	III	40%	1.2 x base

Reduction stage level shall be governed by the Comal Springs flows, and not J-17 Well Levels.

Exemptions

New Braunfels Utilities

New Braunfels Utilities has converted almost entirely to surface water. NBU's winter average water use from the Edwards Aquifer is essentially zero. The Court believes that the NBU should not be subject to the additional water use restrictions, but is of the opinion they should adopt and enforce conservation measures as recommended for other water purveyors in the Guadalupe River Basin. Therefore, New Braunfels should restrict its pumping from the Aquifer at or below its July 1996 total.

Water Use Less than 120 gpcd

Where a water purveyor distributing only Edwards Aquifer water to its customers can demonstrate to the Court through the Special Master that an identifiable, discreet portion of its service area, based on reports to the Texas Water Development Board, has a gallon per capita per day water usage from the Edwards Aquifer of less than a 120 gpcd, that discreet portion shall be exempt from reductions in discretionary water use in this *Plan*, except for car washing and Stage III reductions for watering of golf courses, lawns, parks, parkways, and other landscaped areas.

Industrial, Commercial, and Military Pumpers

Defendant industrial, commercial, and military pumpers should freeze their withdrawals at or below their July 1996 totals. Industrial, commercial, and military

pumpers shall provide the Court with monthly reports of their total withdrawals from the Edwards Aquifer.

In the event that defendant industrial, commercial, or military water use increases, *or that municipal pumpers are unable to reach their maximum allowable peak-to-base pumping ratio requirements of this Plan under the current reduction stage,* additional reductions in Edwards Aquifer pumping can be made only by eliminating all discretionary uses and imposing further restrictions on industrial, commercial, and military water use.

Non-discretionary water uses from the Edwards Aquifer essential to the mission of any military installation are not intended to be restricted by any required reductions in this Plan. As federal defendants, the military bases are expected to appoint a representative to report to the Court through the Special Master monthly on the progress of negotiations for contracting for potable or reuse water as a substitute for the Edwards Aquifer groundwater. The Court urges the military to pursue these projects with all deliberate speed and to execute contracts for substitute sources of water on or before December 31, 1996, so as to further reduce pumping from the Edwards Aquifer. The failure of military bases to execute contracts for substitute sources of water on or before December 31, 1996, will require the Court to initiate additional measures on January 1, 1997 depending on springflows at Comal Springs. Accordingly,

IT IS ORDERED that all defendant municipal pumpers limit their monthly pumpage from the Edwards Aquifer to the appropriate stage reflected by springflow at Comal Springs (currently Stage III). In the event that a

municipal pumper's monthly average exceeds its, maximum allowable peak-to-base pumping ration, the Court reserves any and all remedies both in law and in equity as sanctions for violating this Preliminary Injunction.[3]

IT IS FURTHER ORDERED that Defendant industrial, commercial, and military pumpers shall comply with the discretionary water restrictions. In the event that industrial, commercial, or military water use increases, or that municipal pumpers are unable to reach their maximum allowable peak-to-base pumping ratio requirements, the Court will consider imposing further restrictions on industrial, commercial, and military pumpers.

IT IS FURTHER ORDERED with respect to the municipalities, this Preliminary Injunction shall remain in effect until the Defendants can demonstrate to the Court that the Edwards Aquifer Authority, the state agency created to protect the Aquifer, springflows and the endangered species, has activated, and is enforcing, a critical management plan designed to ensure the preservation of the endangered species dependent upon springflows from Comal and San Marcos Springs in their natural habitat.[4]

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[3] For example, if a municipality exceeds its allotted pumpage during a particular month, the Court will consider the penalties provided for in the Endangered Species Act. *See* 16 U.S.C. § 1540(1). The Court will consider any other remedies which it believes will encourage or coerce compliance with this Preliminary Injunction.

[4] Should any party question the adequateness of the EAA's plan, they are of course free to challenge the EAA and its plan in separate litigation.

IT IS FURTHER ORDERED that the military pumpers pursue with dispatch to execute contracts for substitute sources of water on or before December 31, 1996.

IT IS FURTHER ORDERED that the parties shall immediately supply the Court and the Special Master with its base monthly winter usage (i.e., average of the months of November and December, 1995, and January and February, 1996). The parties shall also supply monthly reports to the Court and the Special Master as to its monthly Edwards Aquifer pumpage not later than five days after the calendar month ends.

IT IS FURTHER ORDERED that all Defendants are directed to furnish to the Court through the Special Master all information, data, and reports necessary to keep the Court informed as to compliance with this Order. The Special Master shall also accumulate and tabulate data concerning springflows, recharge, and pumping by all classes of users from the Edwards Aquifer. The Special Master shall report periodically to the Court concerning efforts by municipalities, water purveyors, military installations and other local and regional water districts and authorities to achieve reductions in Aquifer water use adequate to preserve the endangered species. He shall also report to the Court concerning the survival of species in refuges maintained by the U.S. Fish and Wildlife Service. Finally, the Special Master shall prepare for the Court a plan to restrict agricultural irrigation withdrawals in 1997 in the event that conditions warrant the adoption of such a plan.

IT IS FINALLY ORDERED that this Order shall become effective October 1, 1996, so that the parties are able to take whatever measures necessary to comply with its terms.

SIGNED this 23rd day of August, 1996.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB	)	
	)	**MO-96-CA-97**
v.	)	
SAN ANTONIO, ET AL.	)	(Filed Aug. 29, 1996)
	)	

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is San Antonio and San Antonio Water System Board of Trustees (collectively referred to as "Movants") Joint Application for Stay filed August 26, 1996. After considering all of the evidence presently before the Court, it is the opinion of the Court that the following decision is appropriate.

The Application for Stay and the Preliminary Injunction

Movants make numerous blanket statements in their application for stay. Some of their assertions are overly broad, others misleading, and still others are patently false. Moreover, Movants argue that the Preliminary Injunction was improper because the Sierra Club did not prove the traditional four elements necessary for injunctive relief. The traditional test for preliminary injunctions is not the same test for injunctions under the Endangered Species Act ("ESA"). *Loggerhead Turtle v. County Council of Volusia County, Florida,* 896 F.Supp. 1170 (M.D. Fla. 1995).

Instead, the Supreme Court instructs that when considering the entry of a preliminary injunction under the ESA:

> 1) the Court does not have the "traditional equitable discretion" to balance the parties interest, 2) any threatened harm is *per se* irreparable harm, and 3) the public interest *always* favors the imposition of the injunction under the Act.

Loggerhead Turtle, 896 F.Supp. at 1179 (emphasis added); *see also Tennessee Valley Auth.*, 437 U.S. 153, 174, 184 (1978); *accord National Wildlife Fed'n v. Burlington Northern*, 23 F.3d 1508, 1511 (9th Cir. 1994).

I.

In paragraph 3(a) Movants allege that "No single fountain darter has died as a consequence of water usage and the population of fountain darters at Comal Springs is in no immediate danger." The Endangered Species Act ("ESA") does not require that a species actually die before a party is in violation of the Act, but only require that a species be harmed. *See Babbitt v. Sweet Home Chapter of Commun. For a Great Oregon*, 115 S.Ct. 2407 (1995).

The Act specifically makes it unlawful for any person to "take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(1)(B). The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). A take includes habitat modification. *See Sweet Home*, 115 S.Ct. at 2418. Harm is further defined by the Department of the Interior as any "act which actually kills or injures wildlife. Such act may include

significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1994).

Clark Hubbs, Ph.D., an expert witness testified that the darters were emaciated because of the effects that the slowly flowing streams had on their environment – i.e., food shortages – and not because they were at a stage in their developmental cycle that made them thinner. Dr. Hubbs testified that he is confident that endangered species are dying as the result of the low springflows. In fact, Hubbs testified that as the springs slow, the temperature of the water increases which adversely impacts the endangered species and their food source. Furthermore, Hubbs testified that at his last visit to the springs, he found two exotic species (i.e., species not normally found in that environment). Exotics are found when habitat is disturbed. He also testified that darters are dead or dying at spring run number 1 of Comal Springs. The significant habitat modification and degradation caused by overpumping from the Edwards Aquifer has indeed harmed the Edwards dependent endangered species and amounts to a take.[1]

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[1] In response to this Court's reference to *Genesis* 4:9 in the Injunction, some political pundits have suggested that this Court look to *Luke* 12:7 in this litigation. However, a more accurate reading of *Luke* would be to read verse 12:7 in conjunction with the preceding verse which states: "Are not five sparrows sold for two farthings, and not one of them is forgotten before God?" *Luke* 12:6. This seems much more in line with the Congressional intent and aims of the ESA.

II.

In paragraph 3(b), Movants claims that "there is no cause and effect relationship between Aquifer water usage by any party (including San Antonio) and declining springflow." San Antonio is the largest pumper of the Edwards Aquifer. This Court heard persuasive evidence that on the days that San Antonio allows landscape sprinkling, the springflows drop dramatically the following day. In fact, the chief executive officer of San Antonio's water system testified that 20 million gallons per day is used to water lawns.[2] Although Plaintiff's expert was unable to testify unequivocally as to the cause and effect of Aquifer water usage on declining springflow, Plaintiff built a credible circumstantial case that Edwards pumping adversely affects the springflow. Plaintiff and Defendant's experts agreed that there is a correlation between San Antonio pumpage and Comal springflow, but did not know how great the correlation was. This Court is convinced, for the purposes of this preliminary

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In fact, "*any taking and every taking* – even of a single individual of the protected species is prohibited by the Act. Hence the future threat of a even single taking is sufficient to invoke the authority of the Act." *Loggerhead Turtle*, 896 F.Supp. at 1180 (citations omitted) (emphasis in original); *see also Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995); *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 938 (D. Mont. 1992).

[2] San Antonio currently pumps 185 million gallons per day from the Aquifer. By prohibiting all outside lawn watering, San Antonio could come very near its 1.2 percent winter average. Its 1.2 time winter average (or 120%) would be 161 million gallons per day.

injunction, that San Antonio's pumpage from the Edwards Aquifer adversely affect springflows.

III.

Movants next argue that they cannot control water usage by its 240,000 customers representing over one million people. On June 2, 1995, representatives of San Antonio proposed the very same pumping reductions that this Court has adopted. *See Lawyers Panel Plan*. On February 29, 1996, SAWS proposed adoption of this same plan to the City Council of San Antonio. If SAWS and their representatives felt that they could comply with those pumping restrictions at that time, there is no reason to believe that they cannot comply with them at this time.

These parties have argued to this Court that the current actions taken by Movants through water surcharges have been effective in curbing excessive Aquifer pumping. However, they now claim nothing further can be done. The Court is unpersuaded. Surcharges are an effective mechanism to regulate pumping. Likewise, the City can further limit discretionary water consumption by implementing more aggressive limitations on landscape watering and other suggestions set forth in the *1996 Emergency Withdrawal Reduction Plan*. Movants can also prohibit landscape watering which would further reduce their total pumpage. *See supra* note 2.

IV.

In paragraph 3(d), Movants argue that because conditions at Comal and San Marcos Springs have not changed

since the filing of Plaintiff's lawsuit, there is no emergency need for pumping limitations. When this lawsuit was initially filed, the Edwards Aquifer Authority ("EAA") was about to begin its statutory duty to manage the Aquifer after being given clearance from the Texas Supreme Court. At that time, the Court hoped that the state's regulatory agency would enact measures to deal with the low springflows at that time. However, after two separate votes the EAA did not and has not done anything to protect the Edwards endangered species.[3] This is but one of the events that have made conditions at Comal and San Marcos Springs more perilous – no one is minding the store.

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[3] The EAA published a *Proposed Critical Management Plan* that would reduce pumping from the Edwards to 1.4 times winter average. There are several problems with this limited action. First, the *Plan* does not go into effect, *at the earliest*, until 60 days after its publication. In fact, after the comment period, the EAA could revise the *Plan* and send it back for comment. There is no guarantee that the EAA will have a plan that is in place and being enforced in 60 days.

Second, the Texas Water Development Board has submitted San Antonio pumping figures which indicate that Movants are currently pumping at 1.36 times winter average. It occurs to the Court that even if the EAA's proposed plan were currently in effect it would encourage more pumping by San Antonio (i.e., they could pump .04 percent more than they are currently pumping). This does nothing to encourage conservation and further protection of the endangered species.

Lastly, the Court is perplexed at the EAA's arrival at the 1.4 times winter average, when all current evidence suggests that 1.2 times winter average is the sound benchmark to sustain flow at Comal and San Marcos Springs.

Moreover, springflow at Comal has been below the United States Fish and Wildlife's ("USF&W") "take" levels since the beginning of May, 1996. Springflow at San Marcos Springs have been below take levels since May 24, 1996, well before this litigation commenced. Although the region has recently received some rainfall springflow remain below the jeopardy and take levels established by USF&W.

V.

Movants also argue that this Court should abstain from issuing any injunctive relief because the EAA is currently engaged in active work to develop a Critical Period management Plan. *Joint Appl. for Stay* at ¶ 4. If the EAA had in effect, and was enforcing a management plan designed to protect the Edwards endangered species, this Court might well abstain. In fact, the Court's Injunction states that it will be reviewed if any Defendant:

> can demonstrate to the Court that the Edwards Aquifer Authority, the state agency created to protect the Aquifer, springflows and the endangered species, has activated, and is enforcing, a critical management plan to ensure the preservation of the endangered species dependent upon springflows from Comal and San Marcos Springs in their natural habitat.

Court's Order at 8.

Abstaining at this juncture would require this Court to ignore Congress' federal statutory mandate as evidenced in the ESA. Until or unless the EAA is watching

over the Edwards dependent endangered species, this Court will not abstain.

VI.

In paragraph 5, Movants argue that the Order should be stayed because compliance with the Injunction would "cause vast economic loss for which no recovery can be expected." Congress views the value of endangered species as incalculable. *Tennessee Valley Auth*, 437 U.S. at 174. The Supreme Court has stated that federal courts are not granted authority to make fine utilitarian calculations with respect to what economic value would outweigh the value of an endangered species. In *Tennessee Valley Authority*, as in this case, defendants argued that protection of the endangered snail darter would cause the federal government to lose the tens of millions of dollars already spent on the Tellico dam – a loss that would be unrecoverable and would greatly outweigh the loss of the snail darter. *Id.* The Supreme Court found that an unrecoverable economic loss was not enough to refuse to enforce the ESA. Nor is it a sufficient reason here.

VII.

In perhaps the greatest fabrication in the Joint Application for Stay – one begging for the imposition of sanctions – is paragraph 6. There, the Movants state that the Court's Injunction "orders no reduction measures or required efforts by industrial, commercial, military or irrigation well owners." *Joint Appl. for Stay* at ¶ 6. This is patently false.

On page 8 of the Injunction, this Court ordered the following:

> **IT IS FURTHER ORDERED** that Defendant industrial, commercial, and military pumpers shall comply with the discretionary water restrictions. In the event that industrial, commercial, or military water use increases, or that municipal pumpers are unable to reach their maximum allowable peak-to-base pumping ratio requirements, the Court will consider imposing further restrictions on industrial, commercial, and military pumpers.

Court's Order at 8.

This Court specifically ordered the non-municipal pumpers to comply with discretionary water restrictions. Any suggestion to the contrary is untrue and will merit sanctions in the future.

VIII.

Movants further argue that in order to comply with the 1.2 times winter average peak-to-base pumping ratio requirements, all outside water usage would need to be prohibited. *Joint Appl. for Stay* at ¶ 8. They state that policing such requirements is beyond the resources of the City government. This is another broad sweeping statement with which the Court disagrees. For the majority of the summer, the City has prohibited outside watering during certain hours. If it was able to police those restrictions, it is surely able to police further restrictions. The City has relied on voluntary compliance and citizen reporting for policing the current watering ordinances,

and there is nothing to suggest that they cannot continue to do so.

IX.

In paragraph 9, Movants argue that the Injunction is unnecessary at this time because conditions are expected to improve. First, recharge of the Aquifer during the rainy months in the last five years has failed to match the withdrawals. Thus, each year, the Aquifer continues to drop lower and lower and never regains the volume it held the previous year. Therefore, it should be expected that endangered species will continue to be taken through next summer.

Second, regardless of whether conditions will or will not improve, springflow continues to be below take an [sic] jeopardy levels. As long as they remain below take and jeopardy levels established by USF&W, Movants are in violation of the ESA. *See Loggerhead Turtle*, 896 F.Supp. at 1180. If conditions do improve, the Injunction allows for the easing of restrictions as springflow conditions improve.

Conclusion

This Court believes that a current emergency exists. Springflows are below the take and jeopardy levels established by USF&W. Several of the endangered species have been moved to refugia. Although this is one of the steps necessary to preserve the species, the Court is mindful that some of the species do not reproduce regularly in captivity, and some have never reproduced in captivity.

This Court must see that its statutory mandate that the species and their natural habitat be protected. For the foregoing reasons, this Court will not stay its Injunction. Accordingly,

IT IS ORDERED that Movant's Joint Application for Stay is hereby **DENIED.**

SIGNED this 29th day of August, 1996.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

SIERRA CLUB,

Plaintiff,

vs.

SAN ANTONIO AND SAN ANTONIO WATER SYSTEM, ET AL.

Defendants.

Civil Action No. MO-96-CA-097

(Filed Sep. 10, 1996)

ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO CLARIFY OR IN THE ALTERNATIVE, TO ALTER OR AMEND COURT'S AUGUST 23, 1996 ORDER

Federal Defendants Department of Defense, U.S. Army and U.S. Air Force have moved this court to clarify, or in the alternative, to alter or amend its August 23, 1996 Order. The Court, having considered the Motion and all submitted papers, finds that good cause exists to grant Federal Defendants' Motion. Accordingly,

IT IS HEREBY ORDERED THAT Federal Defendant's Motion to Clarify, or in the Alternative, Alter or Amend, the Court's August 23, 1996 Order is GRANTED. The second full paragraph on page 7 of the August 23, 1996 Order shall be amended to read as follows:

> Non-discretionary water uses from the Edwards Aquifer essential to the mission of any military installation are not intended to be

> restricted by any required reductions in this Plan. As federal defendants, the military bases are expected to appoint a representative to report to the court through the Special Master monthly on the progress of negotiations for contracting for potable or reuse water as a substitute for the Edwards Aquifer groundwater. The Court urges the military to pursue these projects with all deliberate speed and to execute contracts for substitute sources of water as quickly as is feasible, considering the practical limitations and legal requirements necessary to enter into such contracts.

The third full paragraph order on page 8 shall be amended to read:

> **IT IS FURTHER ORDERED** that the military pumpers pursue with dispatch to execute contracts for substitute sources of water as quickly as feasible, considering the practical limitations and legal requirements necessary to enter into such contracts. The military will report to the court through the Special Master on a monthly basis on the process of negotiations for contracting for potable or reuse water as a substitute for the Edwards Aquifer groundwater.

IT IS SO ORDERED.

Date: September 9, 1996

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON, III
SENIOR JUDGE OF THE DISTRICT COURT

(2)

No. 97-0512

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SIERRA CLUB,

Petitioner,

v.

CITY OF SAN ANTONIO, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 112 F.3d 789 (5th Cir. 1997).

COUNTERSTATEMENT

Petitioner Sierra Club seeks review of an interlocutory order of the court of appeals vacating a preliminary injunction that, left undisturbed, would have restricted respondents' ability to obtain needed water supplies from their principal water source, the Edwards Aquifer ("the Edwards"). The appellate court determined that the district court abused its discretion by imposing emergency limitations on withdrawals of water from the Edwards, rather than deferring, under principles of abstention set forth in *Burford v. Sun Oil Co.*, 319

U.S. 315 (1943), to the comprehensive regulatory regime established by the State of Texas for allocating the scarce water resources of the Edwards. Moreover, because the State's regime expressly incorporates federal Endangered Species Act standards, and includes mechanisms for ensuring that such standards are complied with, the court of appeals found the district court's intervention in state water law determinations particularly unwarranted at this stage of the case.

Thus, the question presented turns on the propriety of granting preliminary injunctive relief in the unusual circumstances of this case.

A. Background.

The Edwards Aquifer is a large underground body of water located entirely in Texas. It is the principal source of water for much of south central Texas, including the one million plus citizens of San Antonio. The Edwards is enormous in size, extending about 175 miles in length and covering some 3,600 square miles. It underlies portions of eight counties: Atascosa, Bexar, Comal, Guadalupe, Hays, Kinney, Medina, and Uvalde. Its importance is equally enormous. At least 1,000 different entities, representing millions of water users -- businesses, municipal governments, water districts, associations, utilities, military bases, and private persons -- historically have withdrawn water from the Edwards and are dependent upon it for a variety of health, sanitation, safety, economic, recreational, and national defense purposes.

Growth in demand on this resource, inadequacy of existing regulations to protect interests dependent on the Edwards, its importance to the region, and the need for a comprehensive balancing of those interests led the State of

Texas, in 1993, to enact the Edwards Aquifer Act ("EAA"). The EAA sets forth a comprehensive regulatory system to regulate, manage, and provide for all of the diverse interests dependent on the Edwards, with "due regard for all competing demands for the aquifer's water." Pet. App. 9. Specific legislative findings declare that the Edwards is "a distinctive natural resource in this state, a unique aquifer" (EAA § 1.01) and that it "is the primary source of water for the residents of the region, and is vital to the general economy and welfare of this state." *Id.* § 1.04(a). The Texas Legislature therefore concluded that it is "necessary" and "appropriate" for the State to "provide for the management of the aquifer . . . consistent with [its] legal system and appropriate to the aquifer system." *Id.*

Accordingly, the EAA created the Edwards Aquifer Authority ("Authority") and gave it jurisdiction over all users of water from the Edwards. It invested the Authority with "all of the powers and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." *Id.* § 1.08.

The Authority is charged with controlling withdrawals from the Edwards, principally through a permit system. It will grant regular permits only to existing users who can establish, by convincing evidence, beneficial use of the water withdrawn between June 1, 1972 and May 31, 1993. *Id.* § 1.16. Even when a permit is granted, ceilings are placed on the amount of water a permit-holder can draw. *Id.*

In regulating withdrawals, the Authority has a number of specific responsibilities. It must, among other things, protect the quality of the Edwards; protect the quality of the surface streams to which the Edwards provides springflow;

achieve water conservation; and maximize the beneficial use of water available for withdrawal from the Edwards. *Id.* § 1.14. Of particular significance to this case, the Authority must "protect aquatic and wildlife habitat" and must "protect species that are designated as threatened or endangered under applicable federal or state law." *Id.*

The Authority is also charged with developing "a comprehensive water management plan that includes conservation, future supply, and demand management plans." *Id.* § 1.25. This responsibility includes providing for a "critical period management plan" that, in periods of crisis, would "require reductions of all discretionary use to the maximum extent feasible." *Id.* § 1.26.

B. The Sierra Club's Lawsuit.

In June 1996, in the midst of a drought affecting the Edwards and those dependent on it,[1] the Sierra Club brought this lawsuit. The lawsuit named as individual defendants the City of San Antonio and the San Antonio Water System; the United States Department of Defense and the United States Army and Air Force; other municipal governments, water districts, private corporations, associations, utilities, and private persons that use Edwards Aquifer water. Such persons were named not only in their individual capacities but as putative representatives of the class of "individuals and entities that currently pump or otherwise capture water in Uvalde, Medina, Kinney, Atascosa, Bexar, Comal or Hays Counties

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[1] The drought ended last year, shortly after the district court's preliminary injunction. Last season's rainfall in the region has substantially recharged the Edwards.

from the Edwards Aquifer." Sierra Club's First Amended Complaint ("Complaint") ¶ 25.

The basis for federal judicial intervention was a claim under the Endangered Species Act ("ESA"). The suit charged San Antonio and the other defendants with violating ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), by "taking" certain endangered and threatened species that live in springs fed by the aquifer.

Petitioner's theory was that water levels in the Edwards had been reduced by the drought and by significant uses of water by communities and industries drawing water from it. Continuation of drought conditions, and further significant use of water, could reduce water levels still further. Not only were millions of persons that depend upon the aquifer potentially affected by the depletion of this resource, but so were certain protected fishes and salamanders that live in two surface springs that are fed by the aquifer. If any of those fishes or salamanders were killed or injured as the combined result of the drought and the defendants' water use, petitioner alleged, the users of water from the aquifer would be responsible for "taking" them in violation of the ESA. Petitioner asked the district court to avoid such a result by imposing emergency restrictions on the use of Edwards water.

At the time the suit was filed, the Edwards Aquifer Act remained subject to challenge in the Texas state courts. Two-and-a-half weeks later, the Texas Supreme Court sustained the constitutionality of the EAA. In upholding the EAA, the court noted that "*the State* has the responsibility under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996) (emphasis added).

The Authority convened almost immediately after the decision in *Barshop*. It conducted a number of public hearings and meetings beginning in July 1996 and continuing through the rest of the year. On votes taken on July 31, 1996 and August 17, 1996, the Authority determined that, based on the available evidence, an emergency did *not* exist at the Edwards that would warrant exercise of emergency powers. Instead, the Authority published critical period management rules for comment in early September 1996. *See* 21 Tex. Reg. 8405 (Sept. 3, 1996). In December 1996, it issued final rules for critical period management, as well as for filing and processing permit applications, which were published in February 1997 in the *Texas Register*. *See* 22 Tex. Reg. 1393-1405 (Feb. 7, 1997); 22 Tex. Reg. 1648-1671 (Feb. 11, 1997).

C. The District Court's Preliminary Injunction.

On July 10, 1996, the Sierra Club moved for a temporary restraining order and preliminary injunction. Based on evidence that several "thin" fountain darters[2] had been observed at Comal Springs,[3] the Sierra Club argued that the

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[2] The fountain darter, a one-inch long endangered fish, was the only species at issue in petitioner's preliminary injunction motion.

[3] The fountain darter lives at Comal Springs and San Marcos Springs. Complaint ¶ 58a. Its "critical habitat," designated by the Fish and Wildlife Service in accordance with the ESA, *see* 50 C.F.R. § 17.95(e) (1995), is at San Marcos Springs. Complaint ¶ 61a. Petitioner's evidence at the preliminary injunction hearing alleged "takes" only at Comal Springs, and amounted to observations of several "very thin" fountain darters out of a population of approximately 100,000 at Comal Springs. *See Sierra Club v. City of San Antonio*, 112 F.3d 789, 791 (5th Cir. 1997); Pet. App. 3.

defendants were "taking" the fountain darter and thereby violating the ESA.

San Antonio opposed the Sierra Club's application for preliminary injunctive relief on a number of grounds. Among other things, San Antonio argued that the Sierra Club was unlikely to succeed on the merits of its lawsuit because the injunctive relief it sought would interfere with efforts by the State of Texas -- as represented by the Edwards Aquifer Authority -- to exercise control over a critical state resource, thus requiring dismissal or a stay of further proceedings under the doctrine of *Burford* abstention.[4]

On August 1, the district court conducted a one-day preliminary injunction hearing. Three weeks later, on August 23, it entered the preliminary injunction. In its 10-page Order, the court acknowledged that the Authority had recently been "given the nod by the Texas Supreme Court" "to develop, implement and enforce a critical management plan that will protect the endangered species and their habitat." Pet. App. 41. Disappointed that the Authority thought no emergency existed at the Edwards, the district court brushed aside the Authority's conclusion on the theory that the Authority "has had only a limited amount of time in which to digest and prepare a plan to protect the Edwards dependent species" and "has a great learning curve to overcome before it is ready to manage the Aquifer." *Id.*

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[4] San Antonio had separately moved the district court to dismiss the action based on *Burford* abstention. The district court denied that motion on August 12, 1996. Contrary to the assertions of the Sierra Club, the district court's order denying that motion was not part of the appeal, was not addressed by the court of appeals, and is not at issue here.

The district court was apparently prepared to stand in for the Authority until the Authority could overcome that learning curve. Declaring that "an emergency exists," the court then made its central findings -- which had nothing to do with the ESA issues presented in the case -- that "[t]he Edwards Aquifer region has finally reached the point where the Aquifer is unable to provide for the needs of all those who depend upon it during dry years," and that "[w]ithout a fundamental change in the value the region places on fresh water, a major effort to conserve and reuse Aquifer water, and implemented plans to import supplemental supplies of water, the region's quality of life and economic future is imperiled." *Id.* at 40-41.[5]

In view of these determinations, which were, of course, contrary to the approach taken by the Authority, the district court commended the parties to an Emergency Withdrawal Reduction Plan that prescribed specific methods for limiting water usage from the aquifer in emergencies. It

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[5] Indeed, petitioner's only claim -- that the use of aquifer water is "taking" endangered species in violation of ESA § 9 -- seems almost incidental to the district court's decision. Except for the single, passing reference that "[t]he court is soundly convinced that . . . takes of endangered species are occurring," Pet. App. 41, there is no discussion of the issue in the court's 10-page opinion. Nor is there mention of it in the 33-page Emergency Withdrawal Reduction Plan ("Plan") that is attached to and incorporated in the court's decision. The issues that appeared to be of primary concern to the district court -- the effects of aquifer water usage on "the region's quality of life and economic future," *id.* at 41, "the health, safety, welfare and economic well-being of the people of the region," Plan at 1-2, and downstream water supply, *id.* at 1, 5-7 -- are issues committed to the Authority by the Texas legislature, but not issues presented to the district court by the Sierra Club's complaint.

then imposed specific limitations on water usage. *Id.* at 43-44. Finally, the court ordered the parties to "supply the Court and the Special Master with its base monthly winter usage"; monthly reports "as to its monthly Edwards Aquifer pumpage not later than five days after the calendar month ends"; and "all information, data, and reports necessary to keep the Court informed as to compliance with this Order." *Id.* at 48.

On September 10, 1996, the court of appeals stayed the district court's preliminary injunction pending appeal.

D. The Decision Vacating the Preliminary Injunction.

On April 30, 1997, the United States Court of Appeals for the Fifth Circuit vacated the preliminary injunction, holding that the Sierra Club had failed to meet the first requirement for a preliminary injunction: a showing of a substantial likelihood of success on the merits. *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997); Pet. App. 1-30. Although it grounded its decision on the doctrine of *Burford* abstention, the court emphasized that the "issue before us is not the ultimate question of whether the district court should abstain, but whether the court properly entered a preliminary injunction. The latter question turns on whether the Sierra Club established a substantial likelihood of success on the merits in the face of the *Burford* abstention doctrine." Pet. App. 7-8.

In analyzing the likelihood of success on the merits, the court of appeals restated the fundamental principles underlying the *Burford* doctrine, as recently set forth by this Court in *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712 (1996): "[F]ederal courts should, consistent with our federal system, afford comity to state governments in carrying out their domestic policy." Pet. App. 13 (citing *Burford*, 319 U.S. at

317-18). Under *Burford*, a federal court should stay its hand when "the plaintiff's claim may be 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.* at 14 (quoting *Quackenbush*, 116 S. Ct. at 1726). The court of appeals recognized that the district court's injunction -- which imposed broad limitations on withdrawals of water from the Edwards based on the district court's determination (contrary to the Authority) that an emergency exists -- directly collided with the State's efforts to regulate the same body of water.

The court of appeals compared this situation with that presented in *Burford*. The Fifth Circuit emphasized the vital state interest in the aquifer and the fact that the aquifer "contains a finite amount of water, and as such, the need for uniform regulation is paramount." *Id.* at 12. As "with the oil fields at issue in [*Burford*], in the present case, Texas clearly has an interest in uniform decision-making regarding this finite amount of water." *Id.* at 13 (citation omitted).

Accordingly, the court of appeals concluded that the district court erred in granting the preliminary injunction. Judge Benavides dissented.

REASONS FOR DENYING THE WRIT

1. As a preliminary matter, this case's interlocutory posture makes it especially inappropriate for a grant of certiorari. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where -- unlike this case -- the court of appeals has decided the merits. *E.g., Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari where "[t]he Court of Appeals vacated the judgment . . . in favor of petitioners, and

remanded the case to the District Court for determination of an appropriate remedy."). *See also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

Here, the court of appeals vacated the district court's preliminary injunction, but did not resolve the case on its merits. As the court of appeals emphasized, the "issue before us is *not the ultimate question of whether the district court should abstain*"; rather the issue was "*whether the court properly entered a preliminary injunction.*" Pet. App. 7-8 (emphasis added). This latter question, the court of appeals continued, "turns on whether the Sierra Club established a substantial likelihood of success on the merits in the face of the *Burford* abstention doctrine." *Id.* at 8.

Thus, the decision below holds only that petitioner had not demonstrated a likelihood of success because of the *likelihood* that *Burford* abstention would bar the district court from granting relief. The appellate court expressly left open the ultimate disposition of the merits:

> The rationale of *Burford* abstention is served by the state's regulation of this enormous water resource rather than by the federal court. *At least, that appears to be true from this preliminary injunction record. We state no bar against the Sierra Club, either in pursuing the merits or in ultimate efforts to protect the water and darters if the State of Texas fails to do so.*

Id. at 17 (emphasis added). Accordingly, although the decision below directly addresses *Burford* abstention, the issue before this Court, properly stated, remains the same as it was in the court of appeals: whether petitioner met its burden of demonstrating the requirements for issuance of a preliminary injunction.[6] Indeed, the interlocutory character of the appeal is heightened here since the possibility of enforcement in federal court in the future remains open if the State fails to protect federal interests.[7]

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[6] Were the Court to accept the case to determine whether the court of appeals correctly vacated the preliminary injunction, it would be necessary to consider, in addition to the abstention issue, petitioner's substantive ESA claims, for they affect the probability of success on the merits. Petitioner's claim is that thousands, or millions, of users of water, acting independently and without specific knowledge, are somehow engaged in "taking" wildlife when their combined actions, along with abnormally dry weather conditions, lower the water levels in certain springs, making it harder for darters to survive in those springs.

The notion that the combined effect of drought conditions and the product of combined actions by thousands of individual actors would be a "take" pushes the notion of causation and the concept of a "take" of wildlife far beyond the plausible. *See generally Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (impossible to suggest that any particular user has actually caused the harm to the species). It is plain that such merits issues would better be addressed on a full and complete record. Such a record is best considered in the first instance in the context of the overall administrative scheme established by the State.

[7] Nor is federal protection unavailing in the interim. The Fish and Wildlife Service ("FWS") -- the federal agency charged with administering and enforcing the ESA -- has enforcement powers, *see* ESA § 11, 16 U.S.C. § 1540, that can be exercised in full harmony with the

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2. Petitioner is incorrect in arguing that the case presents important issues about *Burford* abstention warranting the attention of this Court.

a. The application of *Burford* abstention to particular cases is highly fact-specific. Indeed, the "cases do not provide a formulaic test for determining when dismissal under *Burford* is appropriate." *Quackenbush*, 116 S. Ct. at 1726. Moreover, the proper application of the *Burford* doctrine has been explained by this Court in several decisions, including two recent decisions that, along with *Burford* itself, were the focus of the court of appeals' analysis. As the decision of the court of appeals illustrates, this Court's precedents provide clear, concrete and flexible guidance to the lower courts in applying the doctrine to the many settings in which *Burford* issues arise.

b. The court of appeals was plainly correct in concluding that "abstention appears . . . manifestly warranted under *Burford*." Pet. App. 8. Indeed, this is a compelling case for abstention under that doctrine.

Burford requires a federal court to decline to exercise equitable jurisdiction (a) where federal review would be disruptive of State efforts to establish coherent policy with respect to a matter of substantial public concern, or (b) when there are difficult questions of state law bearing on policy problems of substantial importance. *Quackenbush*, 116 S. Ct. at 1726; *Burford*, 319 U.S. at 315. Moreover, under the teaching of *New Orleans Pub. Serv., Inc. v. Council of City of*

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[7](...continued)
abstention ruling of the court of appeals. Not insignificantly, perhaps, FWS has not thus far shared the district court's view that enforcement is warranted here.

New Orleans, 491 U.S. 350 (1989) ("NOPSI"), where the assertion of federal court jurisdiction would "interfere with proceedings or orders of state administrative agencies," "a federal court sitting in equity *must* decline" to exercise jurisdiction. *Id.* at 361 (emphasis added).

The application of these principles in this case was relatively straightforward. Under the EAA, the Edwards Aquifer Authority has been granted "all the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." EAA § 1.08. As the court of appeals recognized, the preliminary injunction interfered with the Authority's exercise of its administrative authority and disrupted State efforts to establish a coherent policy concerning this crucial State resource. The injunction directly contradicted -- in effect, set aside -- the determination of the Authority.

The Edwards Aquifer Act represents a comprehensive effort to protect and regulate the use of a valuable, and limited, state resource, mediating and reconciling the competing demands for aquifer water. Reconciliation of competing claims by different groups of citizens to a limited resource -- involving different users, different types of users, different industries and different municipalities -- exemplifies the type of policy judgment appropriate for resolution as part of a state administrative process; it is not suitable for disposition by a federal court. As the court of appeals observed, precisely because the "aquifer contains a finite amount of water . . . the need for uniform regulation is paramount." Pet. App. 12. Where uniform regulation is required, deference must be afforded a state administrative process established to address such issues. The federal courts should resist establishing a

competing scheme of overlapping federal *judicial* control over that same resource.

Not only is the Authority charged with the responsibility of monitoring and preserving this valuable state resource, but it is also charged with conserving endangered or threatened species. The Authority is specifically required by the Act to implement these difficult and significant public policy judgments in a manner consistent with environmental laws protecting "species . . . that are designated as threatened or endangered under applicable federal or state law." EAA § 1.14. Thus, there is no reason why federal interests cannot be accommodated within the state administrative scheme.

In contrast, federal jurisdiction here would represent a classic illustration of the tail wagging the dog. Based on its view that depletion of the aquifer as the result of drought and significant use will affect a particular endangered species, just as it will affect millions of other users in the region, the federal district court assumed broad jurisdiction over use of the aquifer, freely substituting its judgment and fact-finding for that of the Authority. As the district court's decision demonstrates, its assumption of jurisdiction contemplated broad declarations and judgments about the proper way to protect and use the aquifer generally. Pet. App. 40-49. The court's pronouncements were tied only superficially, if at all, to the ESA issues that provided the ostensible basis for the exercise of federal jurisdiction. Indeed, at the core of the district court's decision was its clearly expressed disagreement with the Authority's determination that there was, as yet, no water emergency that required imposition of emergency measures. *Id.* at 55.

Where, as here, the State has established an administrative scheme to reconcile competing policy

considerations -- particularly ones that involve competition for limited state resources, and the reconciliation of future demands for that resource with immediate needs -- the federal courts should be extremely reluctant to intrude. That reluctance is reflected in the doctrine of *Burford* abstention, which manifestly applies here.[8]

c. Petitioner's lead argument rests on the proposition that for abstention to apply, "the relief being sought must be discretionary" (Pet. 14-15), for which petitioner cites *Quackenbush*. In *Quackenbush*, of course, this Court noted that abstention has its roots in the understanding

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[8] There is ample illustration in the case law from the circuit courts as to why *Burford* abstention is appropriate in circumstances such as these. *See, e.g., Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 315 (5th Cir. 1993) (upholding *Burford* abstention where "[b]y proceeding, the district court would have risked reaching a different answer than the [state] institutions with greater interest in and familiarity with such matters."); *Barnhardt Marine Ins., Inc. v. New England Int'l Surety of Am., Inc.*, 961 F.2d 529, 532 (5th Cir. 1992) (affirming *Burford* abstention where federal action would have "encroach[ed] upon the exclusive power" granted by the state legislature to a state administrative body); *DuBroff v. DuBroff*, 833 F.2d 557, 561 (5th Cir. 1987) (affirming *Burford* abstention to prevent federal court intrusion into state administrative scheme); *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1247 (2d Cir. 1992) (affirming *Burford* abstention where federal court jurisdiction would interfere with a complex state administrative process); *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (4th Cir. 1988) (affirming *Burford* abstention where federal action would "disrupt the state's efforts to provide a unified method" for addressing a matter of state concern); *Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980) (district court should have abstained on *Burford* grounds where federal review of a federal question would have interfered with a state administrative process).

that a federal court ordinarily has the authority to stay its hand *when it acts as a court of equity*. 116 S. Ct. at 1720-21, 1724-25. Thus, the Court referred to "discretion" in the context of "the discretionary power of a federal court sitting in equity." *Id.* at 1725.

Petitioner's claim in this case clearly calls upon the district court to exercise its *equitable* powers, and is therefore the type of claim that may, in a proper circumstance, require the federal court to give way to principles of comity and respect for state authority that form the foundation of *Burford* abstention.[9] Moreover, even if there were a requirement that there be a separate "discretionary" aspect of the claim, the order of the district court granting the preliminary injunction well illustrates the breadth of remedial discretion at issue in this case. Pet. App. 40-49.

The same confusion infects petitioner's assertion that *Tennessee Valley Authority v. Hill*[10] eliminates district court "discretion," and thus bars abstention, in these circumstances. *TVA v. Hill*, at best, states a substantive rule of law concerning the proper application of the ESA. Even if it were true, as petitioner asserts, that *TVA v. Hill* mandates the protection of

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[9] This Court's discussion in *Quackenbush* was addressed to the question whether the Court had the power to dismiss or remand a case on abstention grounds where no equitable relief was sought. The Court held that where only damages are sought, it is generally inappropriate *to dismiss* or remand, though lesser relief, such as a stay, may be appropriate. 116 S. Ct. at 1725.

[10] 437 U.S. 153 (1978).

individual species members in absolute terms,[11] a federal court asked to apply that substantive rule of law still acts as a court of equity, thus providing the traditional predicate for abstention in a proper circumstance. Moreover, even if there were, as petitioner intimates, an absolute obligation, at all cost, to protect the life of every individual member of an endangered or threatened species, that would still leave discretion in the district court to determine *how* best to implement that protection in the situation presented here -- involving a limited

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[11] *TVA* involved a violation of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), whereas the Sierra Club charges San Antonio here with violating ESA § 9, 16 U.S.C. § 1538. ESA § 7(a)(2), by its terms, involves the question of "jeopardy" to a listed *species*; ESA § 9, in contrast, involves the "take" -- *i.e.*, the death or injury -- of a single animal, an *individual member* of a listed species.

This distinction is important. Four years after *TVA*, the Court had occasion to explain that its holding in *TVA* was not susceptible to broad application because it was dictated by "a statutory provision [ESA § 7] whose terms were" perfectly plain in setting forth "a flat ban on the destruction of critical habitats." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982). The Court emphasized that it was "conceded" in *TVA* that completion of a dam "would eliminate an endangered species by destroying its critical habitat." *Id.* at 314. Thus, "there was no room for compromise between the federal project and the statutory objective to preserve an endangered species; either the snail darter or the completion of the Tellico Dam had to be sacrificed." *Id.* at 332-33 (Stevens, J., dissenting); *see also id.* at 313 (majority opinion). That is not the case where, as here, the "take" of individual animals is alleged but no extinction risk to the species is presented.

resource affected by naturally occurring conditions, such as drought, and by millions of water users.[12]

Indeed, petitioner makes a basic mistake when it asserts that the ESA somehow bars abstention. Petitioner confuses the substantive rule of decision under the ESA, with the doctrine of abstention, a procedural and jurisdictional device that seeks to accommodate interests of federalism. Abstention does not change the rule of decision; even after abstention, federal law remains "supreme" and controlling. On the other hand, where the application of federal law is entangled with complex issues of state law and state policy, *Burford* abstention requires courts to stay their hand to allow specialized administrative bodies, established for that purpose, to do their job without undue federal interference. Abstention simply allows state administrative bodies and state courts to address a problem in the first instance.

d. The unique nature of the state administrative framework at issue here belies petitioner's assertion that the decision of the court of appeals will unleash a parade of horribles, undermining all manner of environmental and civil rights enforcement in the federal courts. The decision of the court of appeals falls squarely within the mainstream of case law applying the *Burford* doctrine. Indeed, the case presents close parallels to *Burford* itself. *See* Pet. App. 8-15. Thus, petitioner's assertion that the "parties can virtually always point

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[12] As noted above, even if the depletion of aquifer reserves, resulting from the combined drought and water usage by thousands of individual users, might be said to contribute to the death of a species member, it remains impossible to describe the usage of water by any individual user as an actionable "take" under § 9 of the ESA. *See* n.6 *supra*.

to *some state policy* . . . that would be directly or indirectly affected by enforcement of the anti-take provisions of the ESA" (Pet. 19) (emphasis supplied), ignores the specific nature of the state policy decisions -- involving the allocation of a scarce resource among competing users -- at issue here.[13] It also disregards the fact that the state regulatory regime *incorporates* federal ESA requirements, thus making it an integral part of the administrative decision-making process.

Equally far-fetched is petitioner's assertion that the holding of the court below will somehow undermine federal enforcement of "critical civil rights" laws on the theory that federal abstention will now be required whenever there exists a parallel state administrative mechanism. *Id.* at 17. The administrative process established by the State here is not merely some form of parallel state enforcement of federal law. To the contrary, it involves public policy judgments about the allocation of scarce state resources prototypically appropriate for determination by *state* administrative agencies. The problem being addressed requires "unified management and decision-making." Pet. App. 11. The decisions to be made must combine scientific knowledge about the condition of the aquifer, with predictions about the weather, and planning about future economic development. This is precisely the type of administrative structure -- designed to address concerns that are uniquely within the State's realm -- that this Court identified in *Burford* itself as requiring abstention. *Id.* at 11-13. The

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[13] Indeed, the court of appeals expressly cautioned that its decision in these unique circumstances should not be read as a broadening of the reach of the *Burford* abstention doctrine. It *agreed* with the Sierra Club that "as a general proposition, a State should not be able to create a regulatory scheme and then claim that federal regulation of the same subject matter does not apply." Pet. App. 18.

decision below foretells no general displacement of civil rights or environmental enforcement from the federal courts.[14]

e. Petitioner's argument that *Burford* abstention "is *inapplicable* if only federal claims are raised" (Pet. 18) is also misguided.[15] *Burford* itself held that abstention may be appropriate "whether jurisdiction is invoked on grounds of diversity of citizenship *or otherwise* . . . ." 319 U.S. at 317-18 (emphasis added). It has been suggested that "the federal basis of jurisdiction may raise the level of justification needed for abstention." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976). In fact, the court of appeals here expressly acknowledged that "one factor is [sic] deciding whether *Burford* abstention should apply is whether the cause of action arises under federal or state law." Pet. App. 13. But the fact that the plaintiff purports to raise federal claims, or solely federal claims, does not preclude abstention where the plaintiff's claim will actually entangle the federal court in issues of state law or policy.

The issue as defined by this Court is *not* governed by how the plaintiff pleads its claim under state or federal law, but rather on whether the resolution of the claim is "in any way entangled in a skein of state law that must be untangled

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[14] We know of no other ESA case, before or since the Fifth Circuit's decision, in which the *Burford* abstention doctrine has been argued, much less applied.

[15] *Burford* involved a federal constitutional claim. Efforts have occasionally been made to distinguish *Burford* on the theory that abstention was especially appropriate in that case precisely because federal constitutional claims were raised. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976).

before the federal case can proceed." *Id.* at 14 (quoting *Quackenbush*, 116 S. Ct. at 1726).[16] Thus, the decision whether to abstain requires an assessment of the extent to which the exercise of federal jurisdiction over the cause will interfere with state administrative processes and undermine the primacy of *state* authority on matters of *state* policy and *state* law. As the plain terms of the district court's preliminary injunction show, it is impossible to frame injunctive relief here without becoming entangled in the complex of regulatory judgments, reflecting both state law and state policy, that are the responsibility of the Edwards Aquifer Authority.[17]

Neither is there much to petitioner's half-hearted claim of a conflict in the circuits. Petitioner cites a footnote in a

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[16] Indeed, *Quackenbush* itself makes clear that *Burford* abstention may be proper if the federal suit involves a state-law claim *or* a federal claim enmeshed in a web of state law. *See* 116 S. Ct. at 1726.

[17] Numerous appellate decisions finding abstention proper involve federal questions. *See DuBroff v. DuBroff*, 833 F.2d 557 (5th Cir. 1987) (RICO claim); *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980) (ERISA claim); *Aluminum Co. of Am. v. Utilities Comm'n of State of N.C.*, 713 F.2d 1024 (4th Cir. 1983) (federal preemption and impermissible burden on interstate commerce), *cert. denied*, 465 U.S. 1052 (1984); *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992) (§ 1983 action); *Browning-Ferris, Inc. v. Baltimore County, Md.*, 774 F.2d 77 (4th Cir. 1985) (same); *Caleb Stowe Assoc. v. County of Albemarle, Va.*, 724 F.2d 1079 (4th Cir. 1984) (same); *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319 (4th Cir.) (same), *cert. denied*, 115 S. Ct. 192 (1994); *Brandenberg v. First Md. Sav. and Loan, Inc.*, 660 F. Supp. 717 (D. Md. 1987) (RICO claim), *aff'd sub nom. Brandenberg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.) (various federal statutes and regulations governing emergency aid to needy families with children), *aff'd sub nom. Canady v. Valentin*, 768 F.2d 501 (2d Cir. 1985).

Ninth Circuit opinion that focused on a different doctrine -- *Colorado River* abstention -- and its application to a water rights dispute arising from an Indian treaty with the United States. *See United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1983), *cert. denied*, *Oregon v. United States*, 467 U.S. 1252 (1984). In a single, cryptic sentence in that footnote,[18] the court of appeals seemed to imply -- without citation or analysis -- that *Burford* abstention was not appropriate in a case involving a federal claim. *Id.* In any event, that unelaborated comment by the Ninth Circuit was made in 1983, and thus long predates this Court's more recent guidance on the issue.[19] Petitioner's interpretation of that footnote is not followed even within the Ninth Circuit, which otherwise has consistently addressed abstention issues *without* suggesting that abstention is inappropriate where only federal claims are directly raised by the plaintiff. *See Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 297 (9th Cir. 1996)

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[18] The Ninth Circuit stated in that footnote: "Unlike *Colorado River*, all claims raised in the federal suit here have their genesis in federal law. Thus, we find no occasion to apply *Burford* abstention." *Id.* The case was one in which the district court had itself narrowed the scope of its own jurisdiction to avoid any interference with the state adjudication of water rights. *Id.* at 1399.

[19] Equally untenable is petitioner's assertion that there is a conflict with the First Circuit which requires that the administrative proceeding itself be subject to review. *See* Pet. at 18. In fact, as described by this Court, the inquiry turns on *interference with* state administrative processes, not direct review of administrative orders. *Quackenbush*, 116 S. Ct. at 1725-26. Even if there was such a requirement -- and there exists no support for that notion in the case law -- the district court's injunction here overturned the Authority's finding of a non-emergency and the Authority's water allocation scheme.

(finding *Burford* abstention proper in a case where only federal claims are expressly raised); *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1031 (9th Cir. 1989) (finding *Burford* inappropriate in a case involving only federal claims, not on the basis or reasoning of the *Adair* footnote, but because the case "does not involve difficult questions of state law"), *cert. granted in part on other grounds*, 496 U.S. 935 (1990).

f. There is no support for petitioner's off-hand suggestion that the *"sine qua non"* of *Burford* abstention is the existence of timely state court review of the administrative action, which, petitioner argues, is somehow absent here. Pet. 17. To the contrary, it is clear that the Authority is subject to the Texas Administrative Procedure Act.[20] Both here and in the court below, Sierra Club tries to raise issues of standing under that Act -- issues which the federal courts, of course, are unable to address. Sierra Club's standing argument is thus entirely hypothetical within the context of this case. What is important, however, is that the administrative process in question would be answerable through judicial process for any failure to enforce the law. *See* Pet. App. 17.

Despite petitioner's apparent distrust of the Texas state courts, there is no reason to suppose that these courts would be less than vigilant in reviewing the Authority's compliance with

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[20] The Texas Supreme Court in *Barshop* held that the EAA implicitly includes within its terms judicial review provisions, stemming principally from Section 1.11(h)'s requirement that the Authority "is subject . . . to the Administrative Procedure and Texas Register Act." 925 S.W.2d at 636. As the Court held, this language requires "contested case hearings and judicial review of the findings from such hearings under the substantial evidence rule." *Id.*

the EAA's mandate to protect species "that are designated as threatened or endangered under applicable federal or state law." EAA § 1.14. The state courts would also have jurisdiction to hear claims directly arising under the ESA in such circumstances since jurisdiction under that statute is not exclusively federal and, absent such a jurisdictional limitation, the state courts presumptively enjoy concurrent jurisdiction over those federal claims. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990) ("state courts have inherent authority, and thus are presumptively competent, to adjudicate claims arising under the laws of the United States").

In any case, if, despite the EAA, the Authority were to fail to protect endangered species, and even assuming that the state courts were not available to review that failure, the decision of the court of appeals does not preclude the further attention of the federal courts as respects the federal issue: the district court retains jurisdiction on remand, and the federal courts would be available to consider the implications of any breakdown in the state administrative and judicial system. However, petitioner's approach would simply pretermit the administrative process altogether, ignoring the Authority's own obligation to act in a manner consistent *with* federal law.

3. The second question presented by the Petition -- concerning an asserted inconsistency between the decision below and *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) -- is also not worthy of review. Indeed, the question rests on a fundamental misunderstanding of principles of appellate jurisdiction, coupled with a misperception of the scope of the court of appeals' decision.

Citing *Mayacamas*, the Petition notes that an order by a district court refusing to abstain is not an appealable order (Pet. 20), and on this basis, insists that the court of appeals

here should not have reached the abstention question. It is true enough, of course, that an order denying a motion to dismiss on abstention grounds does not qualify as an appealable order under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1). *Mayacamas* held that these statutory requirements for an appealable order cannot be circumvented by seeking to characterize a ruling denying a motion to dismiss or to stay as either a "collateral order" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) or as a quasi-injunctive order under the erstwhile *Enelow-Ettelson* rule, which doctrine the Court put to rest for good in *Mayacamas*.

The mistake petitioner makes is that the basis for appellate jurisdiction in the court below was *not* the order of the district court denying San Antonio's motion to dismiss. Respondents never sought review of that order, and the court of appeals did not review it. *See* Pet. App. 7-8. The only order that was the subject of the appeal was the district court's preliminary injunction order. And, as to such orders, *Mayacamas* changes nothing. As the Court there expressly noted, "Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions. . . ." 485 U.S. at 287. That was the clear basis for jurisdiction below.

In reviewing the district court's entry of the preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1), the court of appeals necessarily considered the propriety of abstaining under *Burford* because, as it explained, "[w]hether the court should have abstained goes directly to whether the plaintiff was likely to succeed on the merits." Pet. App. 7 n.11. Appeal of an order granting or denying a preliminary injunction plainly encompasses all of the issues relevant to the district court's decision to grant the injunction, including the issue whether

abstention will make it unlikely that petitioner's claims will succeed.[21] Preliminary injunctions could not be meaningfully reviewed if, as petitioner suggests, certain issues (like abstention) bearing on the propriety of an injunction were simply declared off-limits to the appellate courts.[22]

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[21] *See Brooks v. New Hampshire Sup. Ct.*, 80 F.3d 633, 637 (1st Cir. 1996) ("The primary integer in the preliminary injunction calculus is the plaintiff's probability of success on the merits . . . . When [abstention] applies, the district court must refrain from reaching the merits of the plaintiff's claims and, thus, there is no real possibility -- let alone a likelihood -- that the plaintiff will succeed in his action.") The courts of appeals are frequently called upon to decide jurisdictional issues on appeal of preliminary injunctions. *E.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (reversing decision granting preliminary injunction where the district court should have abstained); *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995) (vacating preliminary injunction and remanding with instructions to dismiss for lack of subject matter jurisdiction); *Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768 (5th Cir.) (vacating preliminary injunction and remanding to the district court with instructions to dismiss action in light of exhaustion of administrative remedies and principles of equity jurisdiction), *cert. denied*, 454 U.S. 893 (1981).

[22] Petitioner claims that in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), this Court "carefully separated" abstention issues from the "likelihood of success" inquiry in reviewing a preliminary injunction order. Pet. 14, 21. This is a bizarre reading of *Doran*, which has nothing to do with the question presented. In that case, three topless bars succeeded in obtaining a preliminary injunction from a federal court that prevented enforcement against them of a local ordinance that banned topless dancing. However, prior to issuance of the injunction, one of the bars defied the ordinance by permitting its dancers to go topless, thereby subjecting itself to state criminal proceedings under the ordinance. The other two bars complied with the ordinance until they succeeded in

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On the other hand, the court of appeals did not finally resolve the question of whether *Burford* abstention provides a basis for dismissing the action: "The issue before us is not the ultimate question of whether the district court should abstain, but whether the court properly entered a preliminary injunction." *Id.* at 7-8. It left open the possibility that abstention might not apply on a fully developed record should circumstances change; the court held simply that such an outcome was very unlikely based on the record as it now stands.[23]

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[22](...continued)
obtaining the injunction from the district court. In these circumstances, the Court was asked to resolve the applicability to the three bars of *Younger* abstention -- which generally precludes federal courts from enjoining state criminal proceedings. The Court held, straightforwardly enough, that *Younger* abstention precluded a federal court injunction against the one bar that was subject to ongoing state criminal proceedings, but did not apply to the other two bars that were not being prosecuted. There is literally nothing in the *Doran* opinion of relevance here.

[23] Even had the court of appeals passed on the merits of the trial court's denial of respondents' motion to dismiss on abstention grounds in its review of the injunctive order -- which it did not do -- such a procedure would in any event not present a conflict with this Court's cases. As the Petition concedes (Pet. 21), this Court held long ago that it may be appropriate in certain circumstances to do just that. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court of appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss). And, contrary to the suggestion made by petitioner, nothing in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) altered that rule. Indeed, the Court in *Swint* cited *Deckert* for the proposition that its cases "have not universally required courts of appeals to confine review to the precise decision independently subject to appeal." *Id.* at 50.

The court of appeals' decision is, in this sense, a perfectly ordinary example of an appellate court reviewing a preliminary injunction order to ensure that the trial court properly evaluated the traditional four prerequisites to the entry of such an order. Its assessment of the abstention issue was no different from the consideration of any other merits question in deciding whether the moving party had carried its burden of demonstrating "a likelihood of success on the merits." In like circumstances, other lower courts have repeatedly done just what was done here: considered the propriety of abstention in reviewing grants or denials of preliminary injunctions. *E.g.*, *Brooks v. New Hampshire Sup. Ct.*, 80 F.3d 633, 637 (1st Cir. 1996) (affirming denial of preliminary injunction request based on abstention); *Jayaraj v. Scappini*, 66 F.3d 36 (2d Cir. 1995) (vacating district court's preliminary injunction on abstention grounds); *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628 (3d Cir. 1991) (affirming district court's denial of preliminary injunction based on abstention grounds).

In sum, petitioner pointedly mischaracterizes the holding below when it asserts that the court of appeals addressed the "district court's denial of a motion to abstain." Pet. 20. In fact, the court of appeals *declined* to do so. There is no reason why a court evaluating the grant of a preliminary injunction should not have the authority to determine whether the district court had jurisdiction and authority to proceed with the case. That is all the lower court here did. There is nothing in such an inquiry that warrants this Court's review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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